A

DIRECTOR OF FORESTRY, SABAH & ANOR

v.

MAU KAM TONG & ORS AND ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOFF JCA
HASAN LAH JCA
ABU SAMAH NORDIN JCA
[CIVIL APPEAL NOS: S-01-20-05 & S-02-140-05]

C

6 AUGUST 2009

CIVIL PROCEDURE: *Pleadings - Facts not pleaded - Claim for damages - Loss pleaded as RM1,293,005.36 but evidence adduced to show loss amounting to RM2,077,169.68 - Whether court could award damages*

D *at RM2,077,169.68 without amendment of pleadings*

CONTRACT: *Illegality - Contravention of provisions of statute - Powers of attorney and agreements executed to camouflage transfers of non-transferable licences to take forest produce - Transactions illegal and in contravention of Forest Enactment 1968, s. 24(6)*

E

TORT: *Conversion - Detinue - Conversion of goods - Possession of illegally felled timber - Seizure of illegally felled timber and subsequent surrender to lawful owner - Whether detinue and conversion established*

F ***TRADE AND INDUSTRY:*** *Forestry - Possession of illegally felled timber - Seizure of illegally felled timber and subsequent surrender to lawful owner - Whether detinue and conversion established - Forest Enactment 1968, s. 24(6)*

G ***TRADE AND INDUSTRY:*** *Forestry - Licences to take forest produce - Non-transferable licenses - Powers of attorney and agreements executed to camouflage transfers of timber licences - Transactions illegal and in contravention of Forest Enactment 1968, s. 24(6)*

The appellants in the first appeal were the 2nd and 3rd defendants
H and the appellant in the second appeal was the 1st defendant in the court below. The respondents in the two appeals were the plaintiffs in the court below. They were the executors of the estate of Mau Ming, deceased ("the deceased") and Tang Yiu Chi ("TYC"). The deceased and TYC were partners in two business enterprise named
I 'Syarikat Lama' and 'Tung Lee Contractor'. Two licences to take forest produce had been issued under the Forest Rules 1969, namely, Licence No. 27/79 and Licence No. 7/80 ('the Licences').

The respective licence holders had *vide* powers of attorney appointed one Lee Chee Pin (Lee) and one Lai Kon Fah (Lai) as their lawful attorneys to do certain acts in relation to the licences. About four years later, by further powers of attorney, Lee and Lai appointed the deceased and TYC to do certain acts in relation to the Licences. Simultaneously Lee and Lai on one hand and the deceased and TYC trading as Tung Lee Contractor on the other hand entered into Timber Extraction Agreements. Timber Sale Agreements were also entered into between Lee and Lai on one hand and the deceased and TYC trading as Syarikat Lama. The timber concession areas covered under the Licences were adjacent to and shared a common boundary with the timber concession area held by the 1st defendant. Subsequently, complaints were made stating that illegal felling of timber was being carried out within the 1st defendant's concession area by Tung Lee Contractor. In the course of investigation, the 3,008 logs were seized and were subsequently handed to the 1st defendant. Tung Lee Contractor claimed that their subcontractor, Borhill Sdn Bhd, had stolen timber from the 1st defendant's concession area. The deceased and TYC claimed against the 1st defendant damages for conversion of 3,008 logs which they claimed belonged to them. As against the 2nd and 3rd defendants, the plaintiffs claimed damages for gross negligence for suffering or permitting the 1st defendant to convert the said 3,008 logs after the 2nd and 3rd defendants took possession of the same. The trial judge allowed the plaintiffs' claim. In relation to the charge of negligence as against the 2nd and 3rd defendants, the trial judge awarded damages in the sum of RM2,077,169.68. The appellants appealed against these decisions.

Held (allowing both the appeals with costs)
Per Mohd Ghazali Yusoff JCA:

(1) The evidence showed the nexus between the illegal felling carried out in the 1st defendant's concession area and the 3,008 logs recovered by the 2nd defendant. The deceased and TYC were deliberately painting an "aura of innocence" with regards to the theft of the 3,008 logs from the 1st defendant's concession area and that they had no knowledge of the illegal felling and blaming the whole episode on Borhill Sdn Bhd. The deceased and TYC failed in their claim against the defendants for conversion and negligence. Borhill Sdn Bhd was the sub-contractor and the servant of the deceased and TYC trading as Tung Lee Contractor. (paras 65, 67 & 68)

(2) The two timber extractions agreements and the timber sale agreements were clearly in breach of s. 24(6) of the Forest Enactment 1968 ("the Enactment") and therefore illegal and any claim based thereon could not be enforced. Section 24(6) of the Enactment provides that a licence issued under the Enactment shall be personal to the holder and shall not be transferable in any manner whatsoever. The said powers of attorney and the said agreements were clearly devices created to camouflage what was essentially transfers of the Licences. The trial judge erred in law and in fact in failing to give a proper construction and effect to s. 24(6) of the Enactment which clearly does not provide for any exception to the non-transferability of the Licences granted under the Enactment. (paras 74 & 76)

(3) The claim of the deceased and TYC relating to the tort of conversion could not stand at all. The deceased and TYC claimed that the 3,008 logs were extracted from the areas under the Licences. The evidence however showed that the 3,008 logs were extracted from the 1st defendant's concession area. Thus, conversion could not arise. (para 99)

(4) The trial judge held that the deceased and TYC had adduced evidence of the total value of the logs to be RM2,077,169.68. However, the deceased and TYC had expressly pleaded that the value of the logs before payment of royalties was RM1,293,005.36. Therefore, such an award could not be made without an amendment to the pleadings. The award was clearly erroneous and preposterous. (para 103)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu di dalam rayuan pertama adalah defendan kedua dan ketiga dan perayu di dalam rayuan kedua adalah defendan pertama di dalam mahkamah ini. Responden-responden dalam kedua-dua rayuan tersebut adalah plaintif-plaintif di dalam mahkamah ini. Mereka adalah wasi-wasi semasa pusaka simati, Mau ('simati') dan Tang Yiu Chi ("TYC"). Simati dan TYC adalah rakan perniagaan di dalam dua jenis kegiatan perusahaan yang bernama 'Syarikat Lama' dan 'Tung Lee Contractor'. Dua lesen untuk mengumpul hasil-hasil perhutanan telah dikeluarkan di bawah Kaedah-kaedah Perhutanan 1969, iaitu, Lesen No. 27/79 dan Lesen No. 7/80 ('Lesen-Lesen'). Pemegang-pemegang lesen masing-masing di bawah surat kuasa wakil melantik satu Lee Chee Pin (Lee) dan satu Lai Kon Fah (Lai) sebagai wakil undang-undang untuk menjalankan

beberapa tindakan yang berkaitan dengan lesen-lesen tersebut. Empat tahun kemudian, mengikut surat kuasa wakil, Lee dan Lai telah melantik simati dan TYC untuk menjalankan beberapa tindakan berkaitan dengan lesen-lesen tersebut. Secara serentak, Lee dan Lai di satu pihak dan simati dan TYC yang berniaga sebagai Tung Lee Conractor pada pihak yang lain telah memasuki Timber Extraction Agreements. Timber Sale Agreements juga telah dimasuki di antara Lee dan Lai di satu pihak dan simati dan TYC berniaga sebagai Syarikat Lama. Kawasan konsesi balak yang berada di bawah lesen-lesen tersebut bersebelahan dan berkongsi sempadan am dengan kawasan konsesi balak yang dipegang oleh defendant pertama. Kemudiannya, aduan-aduan telah dibuat menyatakan bahawa penebusan kayu balak haram telah dilaksanakan di dalam kawasan konsesi defendan pertama oleh Tung Lee Contractor. Dalam proses penyiasatan, 3008 kayu balak telah dirampas dan diberi kepada defendan pertama. Tung Lee Contractor mendakwa bahawa subkontraktor mereka, Borhill Sdn Bhd, telah mencuri kayu balak daripada kawasan konsesi defendan pertama. Simati dan TYC memohon terhadap defendan pertama ganti rugi untuk tindakan penukaran 3,008 kayu balak yang mereka dakwa adalah kepunyaan mereka. Terhadap defendan kedua dan ketiga pula, plaintif-plaintif memohon ganti rugi untuk kecuaian melampau untuk kesengsaraan atau membenarkan defendan pertama melakukan tindakan penukaran 3,008 kayu balak tersebut selepas defendan kedua dan ketiga mengambil milikannya. Hakim bicara telah membenarkan permohonan plaintif-plaintif. Berkaitan dengan tuduhan kecuaian terhadap defendan kedua dan ketiga, hakim bicara telah mengawardkan ganti rugi dalam jumlah RM2,077,169.68. Perayu-perayu telah merayu terhadap keputusan-keputusan ini.

Diputuskan (membenarkan kedua-dua rayuan dengan kos)
Oleh Mohd Ghazali Yusoff HMR:

(1) Keterangan menunjukkan nexus antara penebusan haram yang telah dijalankan di kawasan konsesi defendan pertama dan 3,008 kayu balak yang dijumpai oleh defendan kedua. Simati dan TYC dengan sengajanya menggambarkan 'aura of innocence' mengenai pencurian 3,009 kayu balak daripada kawasan konsesi defendan pertama dan mereka tidak mempunyai pengetahuan mengenai penebusan haram dan menyalahkan Borhill Sdn Bhd. Simati dan TYC gagal dalam permohonan mereka terhadap defendan-defendan untuk tindakan penukaran dan kecuaian. Borhill Sdn Bhd adalah subkontraktor dan pekerja simati dan TYC yang berniaga sebagai Tung Lee Contractor.

(2) Kedua-dua Timber Extraction Agreements dan Timber Sale Agreements dengan jelasnya telah melanggar s. 24(6) Enakmen Hutan 1968 ('Enakmen tersebut') dan oleh itu adalah taksah dan apa-apa permohonan berdasarkannya tidak boleh dilaksanakan. Seksyen 24(6) Enakmen tersebut menyatakan bahawa lesen yang telah dikeluarkan di bawah enakmen tersebut adalah hak peribadi kepada pemegangnya dan tidak boleh dipindahkan dalam apa jua keadaan. Surat kuasa wakil dan perjanjian-perjanjian tersebut adalah penipuan yang dirancang untuk menyembunyikan pemindahan lesen-lesen. Hakim bicara telah khilaf apabila gagal untuk memberi pentafsiran yang betul dan efek kepada s. 24(6) Enakmen tersebut yang dengan jelasnya tidak memberi apa-apa pengecualian kepada ketidak-pindahan lesen-lesen yang telah diberi di bawah Enakmen.

(3) Dakwaan simati dan TYC mengenai tort of conversion tidak boleh berdiri langsung. Simati dan TYC mendakwa bahawa 3,008 kayu balak telah diekstrakkan dari kawasan-kawasan di bawah lesen-lesen. Keterangan menunjukkan bahawa 3,008 kayu balak telah diekstrakkan daripada kawasan konsesi defendan pertama. Oleh itu, konversi tidak sepatutnya timbul.

(4) Hakim bicara memutuskan bahawa simati dan TYC telah megemukakan keterangan bahawa nilai keseluruhan kayu balak adalah RM2,077,169.68. Walaubagaimanapun, simati dan TYC telah memplidkan bahawa nilai kayu balak sebelum bayaran royalti adalah RM1,293,005.36. Oleh itu, award sebegini tidak sepatutnya dibuat tanpa pindaan pada pliding. Award yang diberi jelasnya salah dan tidak masuk akal.

Case(s) referred to:

Berenger v. Rozario (mw) [1953] 1 LNS 7 HC ***(refd)***

Chu Choon Moi v. Ngan Sew Tin [1985] 1 LNS 134 FC ***(refd)***

Cynsan Development Sdn Bhd v. Majunis Tumpi & Ors [1997] 3 CLJ 396 HC ***(refd)***

Daniel D William v. Luhat Wan & Ors & Another Case (2) [1990] 1 CLJ 472; [1990] 1 CLJ (Rep) 762 HC ***(refd)***

Khau Daw Yau v. Kin Nam Realty Development Sdn Bhd [1982] 1 LNS 81 HC ***(refd)***

Lam Teik Kai v. Hallam Nominees Ltd & Ors [1970] 1 LNS 55 HC ***(refd)***

Lim Kim Chet & Anor v. Multar Masngud [1984] 2 CLJ 77; [1984] 1 CLJ (Rep) 23 PC ***(refd)***

Lo Su Tsoon Timber Depot v. Southern Estate Sdn Bhd [1970] 1 LNS 68 FC ***(refd)***

Sajan Singh v. Sardara Ali [1959] 1 LNS 90 PC ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
Sundang Timber Co Sdn Bhd v. Kinabatangan Development Co Sdn Bhd [1976] 1 LNS 148 FC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 22(4)
Forest Enactment 1968 (Sabah), ss. 20(1), 23, 24(6), 26, 36(1)(d), 37(2), 40
Housing Developers (Control and Licensing) Rules 1970, r. 11(1)
Registration of Business Act 1956, s. 1(2)

Other source(s) referred to:
Clerk & Lindsell on Torts, 6th edn, p 1226
Halsbury's Laws of England, vol 38, 3rd edn, paras 775, 776
Winfield & Jolowicz on Tort, 15th ed, pp 588, 597-598

(Civil Appeal No: S-01-20-2005)
For the 2nd & 3rd appellants - Mohd Hanafiah Kasim
For the respondents - Marina Tiu (Nooraihan Mohammad Ali with her); M/s Yap Chin & Tiu

(Civil Appeal No: S-02-140-2005)
For the appellant - Norbert Yap (Celestina Stuel Gaid; M/s Jayasuriya Kah & Co
For the respondents - Marina Tiu (Nooraihan Mohammad Ali with her); M/s Yap Chin & Tiu

[Appeal from High Court, Sandakan; Suit No: S26-1989]

Reported by Amutha Suppayah

JUDGMENT

Mohd Ghazali Yusoff JCA:

[1] There are two appeals before us. These appeals arose out of the same suit. The appellants in the first appeal (the 2nd and 3rd defendants in the court below) are the Director of Forestry and the Government of the State of Sabah, respectively and the appellant in the second appeal (the 1st defendant in the court below) is the Board of Trustees of Yasayan Sabah. In this judgment, for ease of reference, I will refer to the appellants as they were in the court below.

[2] The respondents in these two appeals are the plaintiffs in the court below. They are Mau Kam Tong and Mau Kim Siong who are the executors of the estate of Mau Ming, deceased (hereafter referred to as "the deceased") and Tang Yiu Chi (hereafter referred to as "TYC").

[3] The deceased and TYC, prior to the demise of the deceased on 10 December 1989, were partners in two business enterprise named 'Syarikat Lama' and 'Tung Lee Contractor'. With regards to this, it would be appropriate to mention here that the evidence does not show that Syarikat Lama and Tung Lee Contractors are companies incorporated under the Companies Act 1965. Section 22(4) of the Companies Act provides:

> A private company shall have the word "Sendirian" or the abbreviation "Sdn." as part of its name, inserted immediately before the word "Berhad" or before the abbreviation "Bhd." or in the case of an unlimited company, at the end of its name.

A company incorporated by registration under the Companies Act is regarded by the law as a person separate and distinct from the other persons who are its members and directors, ie, it is a separate legal entity. This is the fundamental principle of company law. In the instant case, it is my view that it would have been more appropriate in the course of proceedings in the court below if the parties had referred to Syarikat Lama and Tung Lee Contractor as Mau Ming and Tang Yiu Chi (ie, the deceased and TYC) "trading as Syarikat Lama" or "trading as Tung Lee Contractor" instead of referring to the two business enterprise by their business names as if they were companies or separate legal entities.

[4] In the court below the deceased and TYC claimed against the 1st defendant damages for conversion of 3,008 logs ("the said 3,008 logs") which they claimed belonged to them. As against the 2nd and 3rd defendants, the plaintiffs claimed damages for gross negligence for suffering or permitting the 1st defendant to convert the said 3,008 logs after the 2nd and 3rd defendants took possession of or seized the same. Linton Albert J, the trial judge allowed the plaintiffs' claim and hence, these appeals.

[5] This court in a unanimous judgment had on 26 November 2008 allowed the appeals by the defendants with costs here and below. The reasons for doing so follows.

The Background Leading To The Action

[6] This case revolves around two licences to take forest produce issued under the Forest Rules 1969, namely, Licence No. FOLK 27/79 (hereafter referred to as 'Licence 27/79') and Licence No. FOLK 7/80 (hereafter referred to as 'Licence 7/80).

Licence 27/79

[7] Licence 27/79 (exh. P5) was issued on 4 July 1979 by the 2nd defendant to "Encik Charles Edmund & 4 others". The following persons were named as the licencees, namely:

(i) Charles G Edmund;

(ii) George J Mojuntin;

(iii) Fredoline Edmund;

(iv) Roland Labunda; and

(v) Jintol Mogunting;

(hereafter referred to as "the licencees of Licence 27/79").

[8] Licence 27/79 authorised the licencees to take timber only from approximately 3,167.5 acres of land in the Malua Forest Reserve, District of Lamag as delineated in the plan attached to the licence. The licence expired on 31 December 1979. The licence was subsequently renewed by the 2nd defendant from time to time. It finally expired on 31 December 1986. It would be pertinent to note the following certification appearing at the end of the licence, namely:

> Certificate
>
> I/We certify that the terms and conditions of this licence have been fully explained to me by the District Forest Officer and I/we agree to abide by them. I/We also certify that the boundaries of the licenced area have been demarcated in accordance with Condition 29.
>
> (Sign.) (Sign.)
> Witness Licencee
>
> Lee Chee Phin - I/C H 0596648 &
>
> Date: 5.7.1979 Lai Kon Fah - I/C H 0576118
> P.A. No. 74/78.

It can be noted above that one Lee Chee Pin (PW3) and one Lai Kon Fah affixed their signatures to the above certification as licencees of Licence 27/79, by virtue of being donees of a power of attorney, namely, P.A. No. 74/78. The following facts will illustrate how this came about.

[9] Clause 8 of Licence 27/79 state that "this licence is not transferable". Clause 34 of the same state as follows:

> This licence shall be construed in accordance with and shall be subject to the provisions of any law for the time being in force in Sabah and nothing contained in this licence shall be deemed to relieve the licensee, his agents and servants from complying therewith.

[10] The evidence adduced at the trial with regards to Licence 27/79 revealed the following:

Power Of Attorney No. 74/78

(a) by a power of attorney (registered in the Papar magistrate's court as P/A No. 74/78) dated 15 November 1978, ie, about 71/2 months prior to the issuance of Licence 27/79, the licencees of Licence 27/79, ie, "Encik Charles Edmund & 4 others" (if one may address them as such since Licence 27/79 has then yet to be issued) appointed the said Lee Chee Phin and Lai Kon Fah as "their true and lawful attorneys to do certain acts and things in relation to the approved area";

Power of Attorney appointing the deceased and TYC

(b) about four years later, by a power of attorney (exh. D2) dated 15 January 1983, the said Lee Chee Phin and Lai Kon Fah, "in exercise of the power delegated to us" by the licencees of Licence 27/79, ie, "Encik Charles Edmund & 4 others" appointed the deceased and TYC "jointly and severally to be our true and lawful attorneys to do all or any of the following acts and things in relation to the said land", which are as follows:

> 1. To represent us in all dealings with the Government in particular, to apply to the Forest Department or other Governmental Authorities for the issue of licences, permit passes, for entry onto the said land for the purpose of survey, extraction and removal of timber therefrom and to sign, and execute all documents in connection therewith.

2. To make arrangements for the survey or surveys of the said land to pay for charges and fees in respect thereof.

3. To make payments of royalties, extraction and other charges payable to the Government in respect of timber extracted and removed from the said land, and other dues and charges payable to Government in respect thereof.

4. To engage contractors, or sub-contractors including our attorneys themselves to extract and remove timber from the said land, and for that purpose, to enter into agreement or agreements on such terms and conditions as our attorneys shall think fit.

5. To make arrangements or enter into agreements with buyers including our attorneys themselves for the sale of all logs produced from the said land, to sign, seal and execute all documents that may be necessary for the purpose.

6. To pay and receive monies and give effectual receipts thereof in respect of extraction fees and other charges and in respect of the sale and shipment of logs.

7. To make payment of deposit into bank as may be required by the Forest Department and to open and deposit monies into the trust account for the development of the said land or any land as may be designated by the Government.

8. To apply and claim from the Forest Department or other Departments for refund of all excess payment of royalty and/or cess and/or extraction charge paid to the said Departments from time to time in respect of the said land.

9. To receive and give receipt on any amount refunded by the Forest Department. (All cheques for the refund to be made and issued in the name of Syarikat Lama.) And to endorse and accept all negotiable instruments which have been made payable to us or to the said five persons named in the Schedule hereto.

10. To appoint and remove at pleasure any substitute for or agent under them in respect of all or any of the matters aforesaid.

11. Generally to do all such acts and things as may be necessary or expedient in connection with the aforesaid purposes as fully and effectually as we ourselves could do.

We Hereby Agree to ratify and confirm whatsoever our attorneys their substitute or agent shall lawfully do or cause to be done by virtue of this Deed and We Declare that this Deed made pursuant to consideration given to us by our attorneys shall be irrevocable.

A **Timber Extraction Agreement**

(c) simultaneously and on the same date, ie, 15 January 1983 the said Lee Chee Phin and Lai Kon Fah as "Agents" and Tung Lee Contractor as "the Contractor", that is, the deceased and TYC trading as Tung Lee Contractor entered into a "Timber Extraction Agreement" (exh. P3); the terms and conditions of this agreement, *inter alia*, reads:

> And Whereas the Agents are desirous of engaging the Contractor to extract and remove all merchantable timber from 3,175.6 acres of timber land out of the approved area situate at Malua Forest Reserve subject to renewal of Timber Extraction Licence No. FOLK 27/79 (hereinafter referred to as the "the said land" which expression shall include other land or area as may be granted by the Government in exchange or substitution thereof) on the terms and conditions hereinafter contained.
>
> Now This Agreement Witnesses as follows:
>
> 1. The Agents shall engage the Contractor, and the Contractor shall accept the engagement, to extract and remove all merchantable timber from the said land.
>
> 2. At its own expense, the Contractor shall cut, fell, debark and deliver all the merchantable timber to such log ponds as may be agreed by the Agents and the Contractor. Only timber of merchantable quality shall be extracted from the said land.
>
> 3. The Contractor shall be paid RM2.70 (Malaysian Dollars two and cents seventy only) for every cubic foot of log delivered to the log ponds irrespective of species, grades or sizes. All expenses in connection with the provision and maintenance of the log ponds shall be borne by the Agents.
>
> 4. In determining the payment to the Contractor under this Agreement, the measurements taken by the Forest Department for the purpose of timber royalties less 3 (three) inches on the girth measurement of every log and less any fraction of a foot in the length measurement thereof shall form the basis of payment under this Agreement.
>
> 5. All logs extracted from the said land and delivered to the log pond shall belong to the Agents, and the Contractor

shall as soon as practicable identity *(sic)* each and every log extracted from the said land with a hammer mark and with a serial number.

6. The Contractor shall be entitled to payment within 7 (seven) days after the Agents have been informed by the Contractor of the delivery of logs to the log ponds.

7. The Agents shall be responsible for the payment of timber royalties and other charges payable to the Government and shall ensure the prompt payment of all bills from the Government.

8. The Contractor shall keep proper records of the number and volume of logs extracted from the said land and measured by the Forest Department for royalties purposes and of logs delivered to and received by the Agents at the log pond.

9. The Agents shall provide and permit such access to the said land as may be necessary for logging operations under this Agreement and shall do their utmost endeavour to obtain such access from the Government or owners of neighbouring land, and the Contractor shall be responsible for the payment of all expenses incurred in respect thereof.

10. The Contractor shall ensure that all the logging operations are conducted in accordance with the laws, rules, regulations, directions and instructions of the Forest Department or other Governmental Authorities and the Contractor shall indemnify the Agents against all claims or losses that may be made against the Agents that arise out of the logging operations undertaken by the Contractor.

11. This Agreement shall not be a personal agreement and the Contractor may assign or subcontract the Iogging operations or any part thereof to any person, firm or company without having to obtain the prior approval or consent of the Agents. The Agents shall not interfere directly or indirectly with the logging operations undertaken by the Contractor under the provisions of this Agreement.

12. Any difference, dispute or question which may arise at any time hereafter shall be referred to arbitration in accordance with the law for the time being in force.;

this Timber Extraction Agreement (exh. P3) was signed by TYC on behalf of Tung Lee Contractor;

A **Timber Sale Agreement**

(d) simultaneously and again on the same date, ie, 15 January 1983 the said Lee Chee Phin and Lai Kon Fah as "Agents" and Syarikat Lama as "the purchaser", that is, the deceased and
B TYC trading as Syarikat Lama entered into a "Timber Sale Agreement" (exh. P4); the terms and conditions of this agreement, *inter alia*, reads:

> AND WHEREAS the Agents are desirous of selling and the Purchaser is desirous of buying all the merchantable timber
C extracted from 3,175.6 acres of timber land out of the approved area situate at Malua Forest Reserve subject to renewal of Timber Extraction Licence No. FOLK 27/79 (hereinafter referred to as the "the said land" which expression shall include other land or area as may be granted
D by the Government in exchange or substitution thereof) on the terms and conditions hereinafter contained.
>
> Now This Agreement Witnesses as follows:
>
> 1. In consideration of a sum of RM79,375.00 (Malaysian
E Dollars seventy nine thousand three hundred and seventy five only) to be paid by the Purchaser and of the terms and conditions hereinafter stipulated the Agents agree to sell all the standing merchantable timber on the said land to the Purchaser.
>
> F 2. The said sum of RM79,375.00 shall be paid to the Agents in the following manner:
>
> (i) Upon the signing of this Agreement = RM39,687.50 (the receipt whereof the Agents hereby acknowledge).
>
> G (ii) Within 90 (ninety) days from the date of this Agreement = RM19,843.75.
>
> (iii) Within 150 (one hundred and fifty) days from the date of this Agreement = RM19,843.75.
>
> H 3. The Agents shall not hereafter sell any of the merchantable timber extracted from the said land to any one else or reserve any of the merchantable timber for their own use during the currency of this Agreement.
>
> 4. This Agreement supersedes any previous agreements that
I may have been entered into between the Agents and the Purchaser.

> 5. The terms and conditions of this Agreement may not be varied without the mutual consent of the parties hereto.;

this Timber Sale Agreement (exh. P2) was signed by the deceased for Syarikat Lama.

Licence 7/80

[11] Licence 7/80 (exh. P6) was issued on 28 January 1980 by the 2nd defendant to one Dr Michial K.C. Chan and one David Soong Min Foh (hereafter referred to as "the licencees of Licence 7/80").

[12] Licence 7/80 authorised the licencees to take timber only from approximately 756 acres of land in the Malua Forest Reserve, District of Lamag as delineated in the plan attached to the licence. The licence expired on 31 December 1980. The licence was subsequently renewed by the 2nd defendant from time to time. It finally expired on 31 December 1986. It would also be pertinent to note that it contained a similar certification as that of Licence 27/79 (reproduced earlier). The signatures appearing on the licence at the end of the certification appears to be that of the said Lee Chee Phin and Lai Kon Fah.

[13] Clause 8 of Licence 7/80 similarly state that "this licence is not transferable". Clause 34 of the same reads:

> This licence shall be construed in accordance with and shall be subject to the provisions of any law for the time being in force in Sabah and nothing contained in this licence shall be deemed to relieve the licensee, his agents and servants from complying therewith.

[14] The evidence adduced at the trial with regards to Licence 7/80 revealed the following:

Power of Attorney No. 238/79

(a) by a power of attorney (registered in the Kota Kinabalu magistrate's court as P/A No. 238/79) executed on 23 June 1979, ie, about seven months prior to the issuance of Licence 7/80, the licencees of Licence 7/80 (if one may address them as such since Licence 7/80 has then yet to be issued) appointed the said Lee Chee Phin and Lai Kon Fah as "their true and lawful attorneys to do certain acts and things in relation to the approved area";

Power Of Attorney Appointing The Deceased And TYC

(b) by a power of attorney (exh. D1) dated 15 January 1983, ie, about 3 1/2 years later, the said Lee Chee Phin and Lai Kon Fah, "in exercise of the power delegated to us" by the licencees of Licence 7/80, ie, Dr Michial K.C. Chan and David Soong Min Foh, appointed the deceased and TYC "jointly and severally to be our true and lawful attorneys to do all or any of the following acts and things in relation to the said land"; the "acts and things" therein are identical to that as found in exh. D2 (reproduced earlier); this power of attorney is also irrevocable;

Timber Extraction Agreement

(c) simultaneously and on the same date, ie, 15 January 1983 the said Lee Chee Phin and Lai Kon Fah as "Agents" and Tung Lee Contractor as "the Contractor", that is, the deceased and TYC trading as Tung Lee Contractor entered into a "Timber Extraction Agreement" (exh. P1); the terms and conditions of this agreement are identical to that as found in exh. P3 (reproduced earlier); this agreement was also signed by the deceased for Syarikat Lama;

Timber Sale Agreement

(d) simultaneously and again on the same date, ie, 15 January 1983 the said Lee Chee Phin and Lai Kon Fah as "Agents" and Syarikat Lama as "the purchaser", that is, the deceased and TYC trading as Syarikat Lama entered into a "Timber Sale Agreement" (exh. P2); the terms and conditions of this agreement, *inter alia*, reads:

> And Whereas the Agents are desirous of selling and the Purchaser is desirous of buying all the merchantable timber extracted from 756 acres of timber land out of the approved area situate at Kuamat Forest Reserve subject to renewal of Timber Extraction Licence No. FOLK 7/80 (hereinafter referred to as the "the said land" which expression shall include other land or area as may be granted by the Government in exchange or substitution thereof) on the terms and conditions hereinafter contained.

Now This Agreement Witnesses as follows:

1. The Agents shall sell, and the Purchaser shall buy all the merchantable timber extracted from the said land and delivered to such log ponds as may be arranged between the Agents and the Purchaser.

2. The Agents shall not hereafter sell any of the merchantable timber extracted from the said land to any one else during the currency of this Agreement.

3. The Purchaser shall pay to the Agents RM2.75 (Malaysian Dollars two and cents seventy five only) plus an amount equivalent to the royalty on the same at the rate current at the time of sale and the amount of nett proceeds and extraction charges leviable for every cubic foot of timber that is delivered to and received by the Purchaser at the log pond provided that the nett amount of purchase price payable to the Agents shall not exceed RM10,312.50. The expense of the provision and maintenance of the log ponds shall be borne by the Purchaser.

4. In determining the cubic volume of timber for payment purposes under Clause 3, three (3) inches in the girth measurements of every log and any fraction of a foot in the length measurement thereof shall be disregarded, and it is agreed that the measurements taken by the Forest Department for royalties payment purpose shall form the basis of payment under Clause 3.

5. The Purchaser shall effect payment to the Agents as soon as it has received the logs at the log pond.

6. It shall be the duty of the Agents to inform the Purchaser in good time so as arrangement for the delivery of the logs to the log ponds can be made as soon as possible.

7. The Purchaser shall pay all timber royalties, nett proceeds, extraction charges, premium, survey fees, contractor's extraction fees and other expenses on behalf of the Agents and shall be entitled to recover the same from the payment of the purchase price aforesaid so as to reimburse itself.

8. The Agent shall whenever requested by the Purchaser obtain the necessary export licence from the authorities for the export and shipment of timber but all expenses incurred shall be borne by the Purchaser.

9. Any dispute, question or difference arising out of this Agreement shall be referred to arbitration in accordance with the law for the time being in force.";

this Timber Sale Agreement was signed by the deceased for Syarikat Lama.

[15] The following facts are not disputed, namely:

(a) that the areas covered under Licence 27/79 and Licence 7/80 are adjacent to and share a common boundary with the timber concession area held by the 1st defendant;

(b) that at the material time, the 1st defendant did not carry out any timber operations in its timber concession area; and

(c) that the deceased and TYC used the logging road within the 1st defendant's concession area to transport their logs to their pengkalan (jetty) by the river.

Illegal Felling

[16] On 11 January 1987, Gerald Hiu (DW1), who at the material time was the regional forestry manager of a company named Rakyat Berjaya Sdn Bhd (RBSB), a subsidiary company of the 1st defendant received an anonymous call informing him that there was illegal felling of timber within the 1st defendant's concession area in the Malua Forest Reserve by Tung Lee Contractor. He was then instructed to report the matter to the 2nd defendant.

[17] On the following day, DW1 together with the District Forest Officer, Sandakan, ie, Wong Yin Chung (DW8) and another employee of RBSB went by helicopter to survey the 1st defendant's concession area. Later, they landed at Tung Lee Contractor's pengkalan where they met the deceased. PW8 informed the deceased that Tung Lee Contractor has encroached or had carried out illegal felling in the 1st defendant's concession area. They then brought the deceased by helicopter to the 1st defendant's concession area. They later landed on an open space within the 1st defendant's concession area to carry out an inspection. DW8 subsequently seized the keys to two tractors, noted the serial number of the tractors and the particulars of the workers and also seized two chainsaws found within the 1st defendant's concession area. Later, they brought the deceased to Sandakan by helicopter. In the course of investigation, PW8 seized the said 3,008 logs found at the pengkalan and subsequently handed the same to the 1st defendant.

[18] Meanwhile, on 13 January 1987, the 1st defendant wrote to 2nd defendant as follows: A

> Illegal Felling Within Yayasan Sabah
> Concession Area At Malua
>
> As we had together seen the illegal felling at Malua by Sy. Tung Lee, I would be grateful if you could suspend all their logging activities and all logs in their possession in order to facilitate the necessary investigation to be carried out, please. I am also to understand Borhill Sdn. Bhd., is subcontracting from Sy. Tung Lee and as such I do hope all logs produced by him from the same area should be suspended. A plan is herewith attached.
>
> At the same time, grateful also if you could arrange to have a joint checking, counting and measuring of the timber and extent of the area felled thereat. From our side, we would like to do it with immediate effect.". B C D

[19] By letter dated 14 January 1987 the 2nd defendant informed Tung Lee Contractor that its operations in the licence areas under Licence 27/79 and Licence 7/80 were suspended and that all logs felled and logging machinery are prevented from being taken out of the logging areas; that letter, *inter alia*, reads: E

> 1. Lesen FOLK 7/80
> Pelesen: Dr Michiel KC Chan & Peserta
>
> 2. Lesen FOLK 27/79
> Pelesen: Charles Edmund & Peserta
>
> Syarikat tuan telah didapati terlibat dalam tumbangan haram ini konsisi Yayasan Sabah. Oleh yang demikian kedua-dua lesen yang terlibat diatas adalah digantong dengan serta merta. F
>
> Sila hentikan semua operasi pembalakan dengan serta-merta. Semua kayu-kayu serta semua jentera-jentera pembalakan tidak boleh dikeluarkan. G

[20] The 1st defendant subsequently commissioned three survey teams to carry out a detailed survey of the illegal felling carried out within the 1st defendant's concession area which culminated in the production of a map (exh. D14) showing the various locations where the illegal felling of timber had taken place. H

[21] Meanwhile, by letter dated 22 January 1987, TYC for Tung Lee Contractor informed the 2nd defendant that the logs stored at their pengkalan which are not permitted to be removed by the 2nd I

defendant were covered by water due to flooding and as such sought permission that they be allowed to "save the logs"; that letter reads:

> Flood at Malua/Kinabatangan Camp Site
> Folk 7/80: Dr Micheal Chan & Others
> Folk 27/79: Charles Edmund & 4 4thers [*sic*]
>
> Refer to your letter Folk6501/230/135 d.d. 14,January, 1987 that the Camp operation of both the above licences are to be siezed [sic]. Logs stored at panggarang (river side) are not permitted to be removed. Your Range-Officer and Inspectors are there to exercise their duties.
>
> As a radio-calling from Camp early this morning that there is flood at the Camp-site; the panggarang, where the logs are stored, covered by water and the water level are keep raising, therefore, the logs are in a situation to be drift away, unless, some shifting/rafting works to be done immediately.
>
> Due to this circumstances, would you please instruct your R/O or Inspector to allow us to take some necessary action in order to save the logs (at panggarang), actions such as shifting, rafting and tow to safe spots or the like so as to reduce the losts.
>
> Our Sub-Contractor, M/S Borhill Sdn,Bhd. also awared [*sic*] of this situation, by sending us a letter, copy of which also enclosed herewith.
>
> Kindly treat this request as an urgent one and your immediately instruction will be very much appreciated.".

[22] The above request made by Tung Lee Contractor do not seem to have been acceded to by the 2nd defendant as by letter dated 28 February 1987, the 2nd defendant informed the 1st defendant that the District Forest Officer, Lamag had been directed to issue transit passes to the 1st defendant for their necessary action to take out all felled logs found within the 1st defendant's concession area and the logs found in Tung Lee Contractor's pengkalan; that letter, *inter alia*, reads:

> Alleged Illegal Felling Of Timbers In
> Yayasan Sabah Area In Kinabatangan
>
> Memandangkan kepada kawasan yang berkenaan adalah termasuk dalam kawasan 'consolidated area' Yayasan Sabah, maka selaras dengan Seksyen 26(4), Enakmen Hutan yang mana ada kaitannya dengan Seksyen 26(a); 1(c) semua balak yang terdapat di kawasan yang berkenaan dan juga balak yang telahpun dikeluarkan daripada kawasan yang berkenaan adalah diserahkan kepada pihak Yayasan Sabah.

Dengan demikian, Pegawai Perhutanan Daerah, Lamag adalah dikehendaki untuk mengeluarkan 'transit pass' kepada Yayasan Sabah bagi maksud mengeluarkan balak-balak daripada kawasan yang terlibat dan juga menyerahkan 'transit pass' balak-balak yang terdapat di kolam balak di Sandakan untuk tindakan Yayasan Sabah.

Transit passes

[23] Consequently by letter dated 6 March 1987 the District Forest Officer wrote to the 1st defendant enclosing six transit passes involving 2,446 logs; that letter reads:

Alleged Illegal Felling of Timbers In
Yayasan - Sabah are in Kinabatangan
FOLK 7/80 - Dr Michael KC Chen & Peserta
FOLK 27/79 - Charles Edmund & 4 Peserta
Ruj: JP(Sulit) 22/02/34

Surat Pengarah Perhutanan tersebut yang mana telah disalinkan kepada tuan dirujuk.

Transit pass yang tersebut di bawah adalah diserahkan kepada tuan:

1. T.P. No. 092070 - 401 batang

2. T.P. No. 092073 - 489 batang

3. T.P. No. 092076 - 408 batang

4. T.P. No. 084501 - 597 batang

5. T.P. No. 092080 - 329 batang

6. T.P. No. 092086 - 222 batang

Sila tuan berhubung dengan Pegawai Hutan Kawasan Tangkong untuk mendapatkan Transit Pass bagi kayu-kayu yang masih berada dipengkalan. Kayu-kayu berkenaan dan kayu-kayu yang masih didalam hutan adalah diserahkan kepada Yayasan Sabah.

The above letter was copied to several persons including Tung Lee Contractor.

[24] Pursuant to the above directive, the deceased surrendered the said 3,008 logs to the 2nd defendant. The 2nd defendant then handed the transit passes to RSBS and subsequently the said 3,008 logs were handed to the 1st defendant and later disposed off. The investigation into the illegal felling was completed sometime in April 1987.

[25] By letter dated 15 July 1987, Tung Lee Contractor wrote to Borhill Sdn Bhd as follows:

> Dear Sirs,
>
> We have stored at your log pond in Sandakan, 2446 logs amounting to 10,481.89 M3.
>
> We understand that all timber logs were being removed from your log pond.
>
> Please explain.
>
> Please be informed that we hereby demand that you produce all the 2,446 logs to us.

[26] By letter dated 13 August 1987 addressed to Tung Lee Contractor, solicitors for Borhill Sdn Bhd responded to the above letter as follows:

> Dear Sirs,
>
> Re: 2446 timber logs
>
> We act for Borhill Sdn. Bhd and we have been handed your letter dated 15th July 1987 addressed to our clients with instruction to reply thereto.
>
> We are instructed to state that the facts of this case and the whereabout of the 2446 timber logs are well known to you. Should you require any information or explanation may we suggest that you refer the matter to the Forest Department or Yayasan Sabah.

[27] By letter dated 11 January 1988, Tung Lee Contractor, in response to a letter from Malayan Banking Berhad with regards to two banker guarantees, informed the bank, *inter alia*, that their subcontractor, namely, Borhill Sdn Bhd had stolen timber from the 1st defendant's concession area as a result of which their two logging licences were suspended; that letter reads:

> Banker's Guarantee No. 87/3 for $20,000
>
> Banker's Guarantee No. 87/4 for $10,000
>
> We are in receipt of your letter of 5th January, 1988 Ref: 27-10022/LEK/SJH/no/Bills Dept. and wish to inform you that the Forestry Case no involved for us as at 13th January, 1987 was on the part of our sub-contractor, Borhill Sdn Bhd of Sandakan who stole log timber from Yayasan Sabah's area which made our both logging licences suspended as we were the licence holders.

At the same time, Borhill's 2 units of crawler tractors, one Carterpillar D6D Serial No. 30x 3261 under Forestry Reg. No. F.D. 03-1683 and Komatsu D60E-IK 40479 under Forestry Reg. No. FD03-1679 together with two units Stihl chainsaws were being caught and detained by the Forestry Department.

Peter Hii of Borhill Sdn Bhd and his wife, they were the partners of the Co. whom were being brought up to the Police Station for interogation on the eve of the Chinese New year last and Peter Hii along was repeatedly interogated by the Forestry Department for the stealing of Yayasan Sabah log timber. In this connection, we would ask you to wait for a conclusion whilst and if brings up by the Forestry and up to now they are still keeping silent of the matters.

We will revert as soon as we hear from the Forestry Department.

[28] By letter dated 19 March 1988 addressed to the 2nd defendant, Tung Lee Contractor intimated that their two licences, namely Licence 27/79 and Licence 7/80 were suspended from 14 January 1987 because their sub-contractor, namely Borhill Sdn Bhd had been stealing logs from the 1st defendant's concession area as a result of which over 3,000 logs belonging to them were handed over to the 1st defendant. They then informed the 2nd defendant that their accounts showed that they "still have a credit balance of some RM38,733.32, being excess of royalty fee paid to your Department as per statement of our account attached hereto" and requested for a refund; that letter reads:

Re: Lesen FOLK: 7/80 Dr Michael Chan & Peserta
Lesen FOLK: 27/79 Charles Edmund & 4 Peserta

Our two aforementioned timber licences were suspended from operation on 14.1.1987, due to our sub-contractor, Borhill Sdn. Bhd.'s involvement in logs stealing, from Yayasan Sabah's area, which lies adjacent to our licensed area Lesen FOLK: 27/79, and as a result, over 3000 of our logs both from fresh rafts towed into Sandakan log pond and those stocked at our camp on the river bank were being taken by Yayasan Sabah. Please refer to your letter FOLK 6501/230/135 dated 14.1.1987, with copy to Pegawai Hutan Lingkungan, Sandakan, and Unit Merinyu Hutan, Sandakan and Pegawai Hutan Kawasan Tangkong, FOLK 6516/1/Vol. 1.

However, according to our accounts, we still have a credit balance of some RM38,733.32, being excess of royalty fee paid to your Department as per statement of our account attached hereto which, we trust, you will arrange a refund to us as soon as possible to enable us to close our books.

A Your prompt attention and action in this matter will be much appreciated.

[29] Subsequently, Tung Lee Contractor sent a reminder to the 2nd defendant dated 12 April 1988 about the above credit balance of excess royalty paid to the 2nd defendant wherein they reiterated B that their two licences have been suspended following their sub-contractor's involvement in stealing logs from the 1st defendant's concession area and that their earlier letter was not an appeal for reinstatement of Licence 7/79 and Licence 7/80 but for the refund of excess royalty fee paid; that letter reads: C

Re: Lesen FOLK: 7/80 Dr Michael Chan & Peserta
Lesen FOLK: 27/79 Charles Edmund & 4 Peserta

We refer to our letter dated 19th March, 1988, re the above licences which were revoked following our sub-contractor, Borhill D Sdn. Bhd's involvement in log theft in Yayasan Sabah's forest area and resulting in 3000 logs belonging to us being confiscated by your department.

Our letter under reference was not an appeal for reinstatement of E the timber licences in question. Rather, it was an application for a refund of the excess royalty fee we had paid to your department prior to the above event, amounting to RM38,733.32 as per the Statement of account attached thereto.

However, todate, we do not appear to have received an F acknowledgement, nor the refund applied for.

We shall be grateful if you will look into this matter and effect payment to us of the said sum as soon as possible.

The Suit

G

[30] On 21 June 1989, the deceased and TYC filed this action against the defendants and averred as follows:

(a) that in pursuance of the said agreements, discussed earlier, and Licence 27/79 and Licence 7/80, the said 3,008 logs were H extracted from the licenced areas of which 2,446 logs were, pursuant to valid transit passes issued by the Forestry Department, towed to a log pond in Sandakan from a river bank;

I (b) that trading as Syarikat Lama the deceased and TYC are and were at all material times the owner and/or are entitled to the said 3,008 logs;

(c) that sometime in March 1987, the 1st and 2nd defendants, without any lawful authority and without the consent or permission of the deceased and TYC removed and sold the said 3,008 logs;

(d) that the 1st defendant converted the said 3,008 logs to its own use or benefit and wrongfully deprived the deceased and TYC thereof and by reason whereof the deceased and TYC have suffered loss and damage; it is their claim that the value of the said 3,008 logs, before payment of royalties is RM1,293,005.36;

(e) alternatively, the deceased and TYC aver that the 2nd defendant and/or the State Government of Sabah, ie, the 3rd defendant were grossly negligent in seizing and detaining and in suffering or permitting the 1st defendant to convert the said 3,008 logs after the seizure, the particulars of which are:

(i) failing to comply with s. 37(2) of the Forest Enactment 1968; and or

(ii) failing to comply with s. 26 of the Forest Enactment 1968; and or

(iii) unlawfully permitting or sanctioning the removal and conversion of the said 3,008 logs by the 1st defendant;

(iv) in purporting to act under s. 26 of the Forest Enactment 1968 when the said 3,008 logs were under the possession or control of the deceased and TYC or Syarikat Lama or their nominees or agents;

(v) in failing to recognize and or to take into account the fact that the said 3,008 logs were in the possession or apparent control of the deceased and TYC or Syarikat Lama or their nominees or agents;

(vi) in failing to take into account all the documents and letters which were in their possession and under their control and to which they had access and which documents and letters indicate that the deceased and TYC or Syarikat Lama or their nominees or agents are claiming ownership of the said 3,008 logs;

(vii) in seizing and detaining the said 3,008 logs when there is no reason for believing that a forest offence has been committed in respect of the said 3,008 logs.

A **The Forest Enactment 1968**

[31] Section 36(1)(d) of the Forest Enactment 1968 ("the Enactment") provides, *inter alia*, that any forest officer may seize and detain any forest produce in respect of which there is reason to
B believe that an forest offence has been committed including any tool, instrument, machinery or equipment.

[32] Section 37(2) of the Enactment provides that when anything, including what is mentioned above, is seized, the seizing officer shall forthwith:
C

(a) where the seizure is made by any other person than the director, deliver such thing into the control or custody of the director; and

D (b) except where the seizure is made in the presence of the owner, his agent or servant, as the case may be, give notice in writing of such seizure and the grounds thereof to the owner of such thing:

E (i) if known, either by delivering such notice to him personally or by post at his place of abode or business; or

(ii) if unknown, by publishing such notice in any manner as he thinks fit.'

F **[33]** Section 26 of the Enactment provides as follows:

(1) Any timber which may be found in any place other than on alienated land, and which is not in the apparent possession or under the apparent control of any person, shall be deemed to be the property of the State unless and until any person proves
G to the satisfaction of the director that he is lawfully entitled to the possession thereof.

(2) When any such timber has been so vested in the State the Director may from time to time, as the occasion may require,
H publish or cause to be published a notice thereof in any manner he thinks fit and shall cause a copy of such notice to be served on any person he has reason to believe to be interested in the timber.

I (3) Such notice shall:

(a) contain a description of such timber;

(b) state the place where it was found;

(c) call upon any person claiming to be lawfully entitled to the possession thereof to make his claim to such notice within such period, being not less than one month, as may be specified.

(4) Where any timber taken into possession under sub-s. (1) of this section is in such condition that, in the opinion of the director, it should be disposed of before the expiration of the relevant period mentioned in this section, the director may direct the sale of such timber and the proceeds of such sale shall be dealt with in the same manner as such timber could have been dealt with had it not been so sold.

(5) Notwithstanding sub-s. (2) of s. 4, the powers conferred on the director under this section shall not be delegated to any person and the decision of the director in exercising his powers thereunder shall be final.

(6) No person shall be entitled to recover possession of any timber collected under sub-s. (1) of this section until all expenses incurred in collecting, moving, storing and disposing of the timber as assessed by the director have been paid up to the Government.

[34] The deceased and TYC claimed that by the reason of the matters aforesaid they suffered loss and damage, ie, the value of the said logs amounting RM1,293,305.36 before payment of royalties; they then claimed as follows:

(a) as against the 1st defendant, damages for conversion with interest at 8% per annum from the date of judgment until payment and costs;

(b) as against the 2nd defendant, damages for gross negligence with interest at 8% per annum from the date of judgment until payment and costs;

(c) and/or alternatively as against the 3rd defendant, damages for gross negligence of the 2nd defendant with interest at 8% per annum from the date of judgment until payment and costs.

Defence Of The 1st Defendant

[35] In its defence, the 1st defendant contended as follows:

(a) that the above transactions *vide* the power of attorneys, the timber extractions agreements and the timber sale agreements

relating to Licence 27/79 and Licence 7/80 were and are illegal being in breach of s. 24(6) of the Enactment and that any claim based thereon was and is unenforceable; s. 24(6) of the Enactment reads:

> A licence shall be personal to the holder thereof and shall not be transferable in any manner whatsoever, and shall cease to be valid on the death of such holder or if such holder is declared to be insolvent under the provisions of any written law.

(b) with regards to the said 3,008 logs, it were not extracted from the areas as specified in Licence 27/79 and 7/80 but were illegally felled from lands outside the licensed areas;

(c) with regards to the valid transit passes issued by the 2nd defendant for the said 2,446 logs, it was found necessary to issue the transit passes because of widespread flooding at the material time and to prevent loss of the said 2,446 logs;

(d) it is denied that the deceased and TYC were at all material times the owner or are entitled to the said 3,008 logs;

(e) that it had removed and sold the said 3,008 logs with the consent and permission of the 2nd defendant; and

(f) it is denied that it had converted the said 3,008 logs for its own use or benefit or had wrongly deprived the deceased and TYC of the same.

Defence Of The 2nd And 3rd Defendants

[36] The 2nd and 3rd defendants put up the following defence:

(a) that they have no knowledge of the existence of the said timber extraction agreements and timber sale agreements referred to in the statement of claim and that even if there were such agreements, the same were and are illegal and unenforceable as against them;

(b) they admit that the said 2,446 logs were towed to a log pond in Sandakan pursuant to transit passes but pointed out that the alleged transit passes issued in respect of the said 2,446 logs were issued due to contingency factors, to wit, widespread flooding;

(c) that the said 3,008 logs were not extracted from the areas under Licence 27/79 and Licence 7/80 but were illegally felled from lands outside the licensed areas by the deceased and TYC, their contractors, servants or agents;

(d) they deny that the deceased and TYC are and were at all material times the owner and/or are entitled to the said 3,008 logs and contend that they have no *locus standi* to sue on this matter and further state that they are not entitled to claim the said 3,008 logs;

(e) they deny that they had taken possession or seized the said 3,008 logs as alleged and pointed out that the 2nd defendant had in fact suspended all logging activities and log exports from the areas under Licence 27/79 and Licence 7/80 on the ground of illegal felling activities committed by the deceased and TYC, their contractors, agents or servants;

(f) they deny that they have been grossly negligent as alleged and state that s. 37(2) of the Enactment is irrelevant on the ground that no seizure had taken place and alternatively if, which is denied, s. 37(2) was invoked, notice to the deceased and TYC would not have been required as the deceased was present at the time of the alleged seizure;

(g) that s. 26 of the Enactment does not apply;

(h) further or in the alternative, that by virtue of s. 24(6) of the Enactment, all acts done in pursuance to the power of attorney granted by the licensees of Licence 27/79 and Licence 7/80 were illegal and any claim based thereon is unenforceable;

(i) alternatively, they are protected pursuant to s. 40 of the Enactment; s. 40 reads:

> The Government, forest officers, police officers and members of the armed forces shall not be held responsible for any loss or damage which may occur in respect of any forest produce or other property while detained by, or otherwise in the custody of, any such officer under this Enactment or the rules, or in respect of any timber taken into possession under section 26 of this Enactment, unless such loss or damage arose out of a malicious, fraudulent or grossly negligent act of any such officer.

The Trial

[37] The following facts were not disputed, namely:

(a) that the areas delineated in the plans under Licences 27/79 and Licence 7/80 authorising the respective licencees to take timber are adjacent to and share a common boundary with the timber concession area held by the 1st defendant;

(b) that at the material time, the 1st defendant did not carry out any timber operations in its concession area;

(c) that the deceased and TYC had used the logging road within the 1st defendant's concession area to transport their logs to the deceased and TYC's pengkalan;

(d) that the plaintiffs never paid any royalty for the said 3,008 logs that were detained by the 2nd defendant;

(e) that the 2nd defendant's letter to Tung Lee Contractor giving notice that all logging activities were suspended was dated 14 January 1987;

(f) that the 2nd defendant instructed the District Forest Officer, Lamag to issue transit passes to the 1st defendant by letter dated 28 February 1987 and that the District Forest Officer by letter dated 6 March 1987 forwarded six transit passes bearing Nos. 092070, 092073, 092076, 084501, 092080 and 092086 to the 1st defendant.

Viva Voce Evidence

PW2 (Tang Yiu Chi (TYC))

[38] When asked about Tung Lee Contractor's relationship with Borhill Sdn Bhd, TYC (PW2) testified that "they are the agent to sell and to transport and to export logs for our company"; he later testified that "strictly speaking they are not because we do not have any contract between us" and that "it just they came and help us deal with the logs".

[39] TYC also testified that the deceased was in charge of the camp site of Tung Lee Contractor between 1985 and 1987 but he himself "seldom go to the camp site". He then admitted that he never went to the camp site even after the 1st defendant made a report about illegal felling being carried out within the 1st

defendant's concession area. He stated that he was informed by the deceased through the radio-phone about the inspection being carried out by the 2nd defendant and that the deceased was brought to Sandakan to be interviewed by the 2nd defendant about the illegal felling within the 1st defendant's concession area. At the end of the day, TYC admitted that he was not fully familiar with what had happened on the ground.

[40] TYC then insisted that the deceased and him sued the 1st defendant in their capacity as the owner of the said 3,008 logs. He admitted that the deceased and him were not the licencees of Licence 27/79 and Licence 7/80 but disagreed with the suggestion of learned counsel for the defendants that the rights of the licencees of the two licences have been transferred to the deceased and him.

[41] From my reading of his testimony, TYC seems to have taken the stand that Syarikat Lama and Tung Lee Contractor are companies hence separate legal entities as the timber extraction agreements and the timber sale agreements were entered into between the licencees of Licence 27/79 and Licence 7/80 through their agents, ie, the said Lee Chee Pin and Lai Kon Fah and the said "companies". The minutes of proceedings of the trial judge on this issue reads:

> Q. In what capacity are you and your late partner Mr. Mau Ming suing Yayasan Sabah in this case.
>
> A. I am the owner of this logs.
>
> Q. Are you saying that all the logs in FOLK 27/79 and FOLK 7/80 belongs to you and your partner even though the two licences are under the name of Charles Edmund and 4 others and Michiel Chan and David Soong respectively.
>
> A. Yes.
>
> Q. Are you saying that the rights of the two licencee have been transferred to you and your partner.
>
> A. I disagree.
>
> Q. Then how do you claim the ownership of the logs.
>
> A. Because we have entered into an agreement with them to purchase all the logs extracted from that two areas.
>
> Q. And that the extraction of the logs was also to be carried out by you. Am I correct.

A. It was carried out by another company which belongs to me.

Q. Why did you use the other company Tung Lee contractor to enter into timber extraction agreement.

A. It is because Tung Lee contractor had involved in timber extraction since 1970 and this company also have a lot of machinery to do a timber extraction activities so Tung Lee contractor is very suitable for doing this job.

Q. I put it to you that the reason why you used a different company to enter into the contract is to conceal the true intention and purpose of the arrangement between yourself and the licencee.

A. I do not understand what you are talking about a true intention and purpose of the arrangement however I disagree with your question. It is the licencee who engaged Tung Lee contractor to extract timber and not me who engaged Tung Lee Contractor.

Q. Am I correct to say that the two licencee respectively gave irrevocable power of attorney to you and your partner with full powers to deal with the timber areas including the timber operation.

A. Yes.

[42] It is clear from the above that TYC was insisting that Syarikat Lama and Tung Lee Contractor are companies and hence separate legal entities although that was clearly not the position. The usage of the word "company" by TYC is a misnomer. The minutes of the proceedings as recorded by the trial judge then read as follows:

Q. You are aware that under the two licences, the two licencee cannot transfer the licence to anyone.

A. Yes.

Q. And this restriction is contained in condition 8 of the licence. (Witness referred to page 3, 2nd & 3rd of DBD (1).

A. Yes.

Q. Looking at the same page you agree that under condition 22 of the licence ownership of the logs do not pass to the licencee until royalty has been paid.

A. I disagree.

[43] TYC also testified as follows:

(a) that his camp site office was situated near the pengkalan;

(b) that the deceased stayed in the camp site;

(c) that at the material time the 1st defendant was not extracting timber within the 1st defendant's concession area;

(d) that Tung Lee Contractor had written to the 2nd defendant and Malayan Banking Berhad to inform them that his subcontractor, namely, Borhill Sdn Bhd have illegally extracted timber from the 1st defendant's concession area.

DW1 (Gerald Hiu)

[44] DW1, the then regional forest manager of RBSB, testified that he directed his survey officer, Lee Kok Sang (DW2) to survey the illegally felled areas within the 1st defendant's concession area and to do the necessary "stump enumeration count". He confirmed that the 2nd defendant seized the logs illegally felled and subsequently handed the same to the 1st defendant. *Vide* the said six transit passes issued to the 1st defendant, he testified that 2,446 logs were removed from the plaintiff's pengkalan and transferred to the 1st defendant's log pond at Batu Sapi, Sandakan.

DW2 (Lee Kok Sang)

[45] DW2, who was then a surveyor with RBSB confirmed that on the instructions of DW1 he brought a team to the plaintiff's camp site where he met the deceased and requested that they carry out a joint inspection of the area. DW2 personally supervised the survey of the areas under Licence 27/79 and 7/80 ad the 1st defendant's concession area where illegal felling had been carried out. Later, he organised two more survey teams to assist the inspection carried out by the first team. He testified as follows:

> I saw with my eyes the Yayasan Sabah concession area had been logged as well as the licence area also been logged.
>
> On completing the plotting there were 9 patches of illegal felling just outside their licence area but inside the Yayasan Sabah concession area and 4 patches adjescent (*sic*) to this licence but the fell area was also inside the Yayasan Sabah concession area and I then handing (*sic*) the 7 field books and the preliminary plot with a letter just confirming all the illegal felling inside the Malua Forest Reserved to Mr. Gerald Hiu (DW1).

DW5 (George Jumalon)

[46] DW5, a forest surveyor under the employment of the 1st defendant, testified that he surveyed the felled timber and wrote in the field books the words "tumbangan haram" (illegally felled timber) after having surveyed the areas and inspecting the logs at Tung Lee Contractor's pengkalan. He also discovered that no other "company" was working in the surveyed areas except for "Syarikat Tung Lee".

DW7 (Gideon Peter)

[47] DW7 who was a forest officer under the employment of RBSB and was a member of one of the survey teams testified he went to Tung Lee Contractor's campsite by boat and landed at the "Pengkalan Tung Lee" where he met the deceased. He then went with some members of his team with the deceased who subsequently pointed out the areas that were illegally felled. He testified as follows:

(a) that during the enumeration exercise, his team conducted a hundred percent enumeration; they divided themselves into three teams each consisting of four persons from the 1st defendant and one officer from the 2nd defendant;

(b) that each team was assigned with the letters 'A', 'B' and 'C' and so forth;

(c) that all stumps and logs were numbered and the numbers were painted onto the stump and logs; the paint marks made were to avoid double counting and that every log and stump counted were recorded in their field books;

(d) that the deceased pointed out to them the areas or the patches illegally felled along the Yeng Ho Hong road which was within the 1st defendant's concession area.

DW8 (Wong Yin Chun)

[48] Wong Yin Chun (DW8) who was at the material time the District Forest Officer, Sandakan testified that he seized the said 3,008 logs from the deceased and handed the same to the 1st defendant. He also confirmed that Tung Lee Contractor was the only enterprise working in that area at the material time. In the course of the inspection carried out within the 1st defendant's

concession area, he seized the keys of two units of tractors and two units of chainsaw. The deceased who had accompanied the inspection was present when the seizure was made.

Judgment Of The High Court

Illegality

[49] In his grounds of judgment, Linton Albert J, the trial judge first dealt with the issue of illegality surrounding the power of attorneys and the agreements, that is:

(a) the power of attorneys granted by the licencees of Licence 27/79 and Licence 7/80 appointing Lee Chee Phin and Lai Kon Fah to be their attorneys;

(b) the power of attorneys granted by Lee Chee Phin and Lai Kon Fah "in exercise of the power" delegated to them by the Licencees of Licence 27/79 and Licence 7/80 appointing the deceased and TYC to be their attorneys;

(c) the timber extraction agreements entered into between Lee Chee Phin and Lai Kon Fah as agents and the deceased and TYC trading as Tung Lee Contractor; and

(d) the timber sale agreements entered into between Lee Chee Phin and Lai Kon Fah as agents and the deceased and TYC trading as Syarikat Lama.

[50] In relation to the above transactions, the trial judge said:

> It is not disputed that the partners were also attorneys for the respective licencees of the two timber licences and contractors for the extraction of timber in the areas covered under those two licences which, coupled with the agreement for the sale of merchantable timber relied on by the Plaintiffs, **constituted transactions deemed illegal by virtue of Section 24(6) of the Forest Enactment, 1968**.
>
> Section 24(6) of the Forest Enactment 1968 reads as follows:
>
> > A licence shall be personal to the holder thereof and shall not be transferable in any manner whatsoever, and shall cease to be valid on the death of such holder or if such holder declared to be insolvent under the provisions of any written law.

> Learned counsel for the 1st Defendant, Mr. Nobert Yapp, brought to my attention several decided cases where our courts held that transactions similar or identical to the type established in the present case were illegal and claims based on those transactions unenforceable ... *There was no controversy as to the illegality of the transactions in the present case as their effect was to transfer the two licences to the partners in contravention of Section 24(6) of the Forest Enactment 1968.*
>
> [Emphasis added]

[51] On this issue, the authorities that were cited to the trial judge by counsel for the 1st defendant are *Lo Su Tsoon Timber Depot v. Southern Estate Sdn Bhd* [1970] 1 LNS 68 FC and *Sundang Timber Co Sdn Bhd v. Kinabatangan Development Co Sdn Bhd* [1976] 1 LNS 148 FC. In *Lo Su Tsoon*, the Federal Court held that such an agreement, ie, an assignment of the rights of the licencees under the licence authorising to extract timber and in contravention of an express condition in the licence, was clearly in breach of ss. 23 and 24 of the Forest Enactment of Sabah and therefore illegal and any claim based thereon cannot be enforced. In *Sundang Timber* the Federal Court referred to *Lo Su Tsoon* and similarly held that an agency agreement coupled with a power of attorney entered into with regards to licence to extract timber under the Forest Enactment of Sabah was clearly illegal being in breach of s. 24(6) of the Enactment and consequently any claim based thereon cannot succeed as it would be tainted with illegality.

[52] Notwithstanding his finding that the transactions found in the instant case under appeal were illegal by virtue of s. 24(6) of the Enactment, the trial judge was of the view that *Lo Su Tsoon* and *Sundang Timber* and the other authorities cited "did not, in my judgment, cover the facts of the present case"; he said:

> Indeed, *Lo Su Tsoon Timber* And *Sundang Timber* were cases of high authority. This would, in effect, have meant that the ghost of Robin Hood had come back to haunt the Plaintiffs and must in these circumstances, be exorcised; otherwise, the Plaintiffs' grievance would not be remediable, the 1st Defendant unjustifiably enriched as the unexpected windfall and the public purse not better off by the sale of the logs the proceeds of which the 1st Defendant pocketed, and the 2nd Defendant oblivious to the injustice of the arbitrary seizure of the 3008 logs for the benefit of the 1st Defendant. With respect, the principle illustrated in those cases did not, in my judgment, cover the facts of the present case.

> Here, agreements under which the logs were purchased were *ex facie* lawful and the partners were never in delicto because they did not know that the agreements formed part of the illegal transactions (see *Khau Daw Yau v. Kin Nam Realty Development Sdn Bhd* [1983] 1 MLJ 325); the Plaintiffs did not seek, nor did they found their claim on the illegal transactions (see *Berenger v. Rozario* [1953] MLJ 239); hence, in my judgment, the facts before me constituted an exception to the general principle laid down in the cases relied on by the 1st Defendant. Learned Counsel for the Plaintiffs, Datin Marina Tiu relied on *Sajan Singh v. Sardara Ali* [1960] 26 MLJ 52 and *Daniel S/0 D. William v. Luhat Wan & Ors* [1990] 2 MLJ 48.

[53] The trial judge then went on to discuss the two cases cited by Datin Marina Tiu, learned counsel for the deceased and TYC, and he then said:

> In the circumstances, applying the principles set out in the above authorities, I am satisfied that the defence of illegality was to no avail.

Conversion And Negligence

[54] On the issue of the said 3,008 logs seized by the 2nd defendant, ie, the subject-matter of the deceased and TYC's claim for damages against the 1st defendant for conversion and against the 2nd and 3rd defendants for negligence, the trial judge said:

> There was certainly overwhelming evidence to the effect that the partners had directly or indirectly engaged in illegal logging outside the areas covered under the two licences for which they could and should have been prosecuted or penalized under the relevant provisions of the Forest Enactment 1968 but at the same time, **I am also equally satisfied that there was no nexus whatsoever between the illegal logging and the 3008 disputed logs**. There was not even a shred of evidence to show that the 3008 disputed logs were the product of the illegal logging. ... In the circumstances, I hold that the Defendants have failed to establish, on a balance of probabilities, their pleaded defence that the 3008 logs were from the areas outside the areas under the two licences.
>
> [Emphasis added]

Conversion

[55] In dealing with the tort of conversion upon which the deceased and TYC's claim was founded as against the 1st defendant, the trial judge referred to Clerk & Lindsell on *Torts* (6th ed) at p. 1226 where the learned author said conversion exists when:

A Anyone who without authority takes possession of another man's goods with the intention of asserting some right or dominion over them.

In other words, anyone who deals with goods in a manner inconsistent with the right of the true owner is guilty of a wrongful
B conversion; provided there is an intention on the part of the person so dealing with them to negative the right of the true owner or to assert a right inconsistent therewith.

The trial judge also referred to *Halsbury's Laws of Malaysia*
C (vol. 5) (80.468) which reads:

To sustain a claim founded in conversion the claimant must show that he had either possession, or an immediate right to possession, of the chattel at the material time of the act. Either relationship with the chattel would provide the claimant with the required
D possessory title to support the action in conversion.

[56] In finding that the 1st defendant was liable for conversion, the trial judge said:

It is not disputed that royalties on the 3008 logs were not paid
E when they were seized by the 2nd Defendant and given to the 1st Defendant. The two licences expressly provide that until royalty has been paid the timber shall be deemed to be the property of the 3rd Defendant. Hence, it was argued that in order to succeed the Plaintiffs must show that they were in possession of a valid licence
F and had paid royalties on the logs. There is no merit in this argument. All that the Plaintiffs need to show, which they did, was that the two licences were valid and timber extracted under those licences was purchased from the licensees, the effect of which was sufficient to clothe the Plaintiffs with the essential requirement of possession of the 3008 logs. In fact, the Plaintiffs were in actual
G possession of the 3008 logs, which entitled the Plaintiffs to sue the 1st Defendant in conversion (see *MCC Proceeds INC v. Lehman Bros International (Europe)* [1998] 4 All ER 675).

In the circumstances, the Plaintiffs have established their claim and for the reasons stated above the 1st Defendant's pleaded defences
H are devoid of merit and I accordingly find the 1st Defendant liable for conversion.

I

Negligence

[57] In relation to the charge of negligence as against the 2nd and 3rd defendants, the trial judge said:

> In addition to the plea of illegality the 2nd and 3rd Defendants' pleaded defence to the Plaintiffs' claim in negligence is Section 40 of the Forest Enactment, 1968 which reads as follows:
>
> > The Government, forest officers and police officers shall not be held responsible for any loss or damage which may occur in respect of any forest produce while detained by, or otherwise in the custody of, and such officer under this Enactment or the rules, or in respect of any timber taken into possession under section 26 of this Enactment, unless such loss or damage arose out of the malicious, fraudulent or grossly negligent act of any such officer.
>
> It is patently clear that the act of the 2nd Defendant in seizing the 3008 logs and giving them to the 1st Defendant without first ascertaining that they were illegality [*sic*] felled logs let alone logs felled from the 1st Defendant's licensed area constituted gross negligence. The act of the 2nd Defendant was so grossly negligent that I need not dignify it with any elaboration. Clearly, Section 40 of the Forest Enactment 1968 does not give any protection to the 2nd Defendant.
>
> There is also no merit in the 2nd and 3rd Defendants' plea that the Plaintiffs have no locus standi and are not entitled to the 3008 logs. The Plaintiffs have clearly established that they were in actual possession of the logs pursuant to the two licences and agreements made with the licensees thereof when they were seized and given to the 1st Defendant.
>
> I, therefore, hold that the 2nd Defendant was grossly negligent and liable to the Plaintiff for their loss. The Government of the State of Sabah (3rd Defendant) is also liable because the 2nd Defendant is the servant or agent of the 3rd Defendant.

[58] In awarding damages in the sum of RM2,077,169.68, the trial judge said:

> The Plaintiffs have adduced evidence of the total value of the 3008 logs which constitute their loss. The amount arrived at was RM2,077,169.68. This is neither disputed nor challenged by the Defendant and would, therefore, be the measure of damages the Plaintiffs are entitled to (see *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1986] 1 MLJ 105; *BBMB Finance (HK) Ltd v. EDA Holdings Ltd & Ors* [1991] 2 All ER 129). I decline, however, to award an additional sum to reflect the devaluation of the ringgit.

A This is to account for the royalties the Plaintiffs would otherwise have paid in respect of the 3008 logs.

In the circumstances, therefore, the Plaintiffs are entitled to the claim they ask for in their statement of claim against the 1st, 2 and 3rd Defendants and I accordingly enter judgment for the B Plaintiff in the sum of RM2,077,169.68 with interest thereon at 8% per annum from date of judgment until full settlement with costs to be taxed unless agreed.

Judgment Of This Court

C **[59]** This court had in a unanimous judgment on 26 November 2008 allowed both appeals for the following reasons.

[60] The trial judge found that "there was no controversy as the illegality of the transactions in the present case as their effect was D to transfer the two licences to the partners in contravention of s. 24(6) of the Forest Enactment 1968". I would have thought that once the court find that the transactions are illegal, being in breach of s. 24(6) of the Enactment, the matter would end there and the deceased's and TYC's claim would be dismissed, it being E unenforceable as the claim was based on an illegal transaction. The transactions as a whole, ie, the power of attorneys from the respective licencees of Licence 27/79 and Licence 7/80 appointing the said Lee Chee Phin and Lai Kon Fah, the power of attorneys of the said Lee Chee Phin and Lai Kon Fah appointing the F deceased and TYC, the two timber extraction agreements and the two timber sale agreements, to me were clearly illegal being in contravention of the provisions of the Enactment and the rules made thereunder. The trial judge however embarked on a very different course in arriving at the decision that he made when he G allowed the claim of the deceased and TYC.

[61] I am of the view that the decision in the instant case under appeal is a case "where there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him" H to borrow the words of Gopal Sri Ram and Mahadev Shankar JJCA in *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545. In *Sivalingam Periasamy*, the learned judges of this court said (at p. 550):

I ... we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which have properly directed itself and asked the correct questions would have arrived at the same conclusion.

I am the view that the trial court in the instant case under appeal has also fundamentally misdirected itself.

[62] In his grounds of judgment in the instant case under appeal, the trial judge rightly found that the said power of attorneys and the said agreements to extract timber coupled with the timber sale agreements "constituted transactions deemed illegal by virtue of s. 24(6) of the Forest Enactment, 1968". It is my view that having made that finding, he correctly ruled that "there was no controversy as to the illegality of the transactions in the present case as their effect was to transfer the two licences to the partners in contravention of s. 24(6) of the Forest Enactment 1968". He however then made an issue out of the said 3,008 logs which he said was arbitrarily seized by the 2nd defendant and presented to the 1st defendant which then sold the same and "pocketed" the proceeds. As a consequence of this, the trial judge said that 1st defendant was "unjustifiably enriched" whilst the "public purse" was "not better off by the sale of the logs the proceeds of which the 1st defendant pocketed".

[63] The trial judge then ruled that under the circumstances of the case, the authorities referred to him by learned counsel for the defendants, including *Lo Su Tsoon* and *Sundang Timber* have no bearing upon the instant case under appeal as the facts here were different, namely, the agreements under which the logs were purchased "were *ex facie* lawful and the partners were never in delicto because they did not know that the agreements formed part of the illegal transactions". He then said that "the plaintiffs did not seek, nor did they found their claim on the illegal transactions".

[64] In the next breath, the trial judge said he found "there was overwhelming evidence" that the deceased and TYC "had directly or indirectly engaged in illegal logging outside the areas covered under the two licences" for which they could be prosecuted under the enactment but then he was satisfied "that there was no nexus whatsoever between the illegal logging and the 3008 disputed logs". He then ruled that under the circumstances the defendants have failed to establish their pleaded defence that the said 3,008 logs "were from the areas outside the areas under the two licences".

[65] I find it difficult to comprehend the reasoning of the trial judge discussed above in view of the undisputed facts and the evidence adduced in the course of the trial. The evidence clearly showed the nexus between the illegal felling carried out in the 1st defendant's concession area and the said 3,008 logs recovered by the

2nd defendant from Tung Lee Contractor's pengkalan. This can clearly be seen from the evidence of the witnesses who testified for the defendants, namely, DW1, DW2, DW5, DW7 and DW8. Their evidence showed that the defendants had carried out a thorough inspection of the illegally felled areas within the 1st defendant's concession area. These witnesses testified that in the course of their inspection, they had marked all the tree stumps within the illegally felled area within the 1st defendant's concession area. Consequently, the inspection teams conducted a "hundred percent enunciation" of the logs illegally felled. They subsequently inspected the felled timber at Tung Lee Contractor's pengkalan and concluded that the said logs were extracted from the 1st defendant's concession area. At the outset, this was not disputed by the deceased and TYC. Further investigation showed that no other person or "company" was carrying out logging activities in the 1st defendant's concession area and the surrounding areas, *viz*., the areas under Licence 27/79 and Licence 7/80 except for Tung Lee Contractor. The evidence further showed that the deceased accompanied one of the defendant's survey teams whereupon the deceased pointed out the areas within the 1st defendant's concession area that were illegally felled. DW8, the District Forest Officer of Sandakan testified that he seized the said 3,008 logs from the deceased and subsequently handed the same to the 1st defendant.

[66] In his evidence, TYC admitted that his knowledge of the circumstances leading to the seizure of the said 3,008 logs by the 2nd defendant consisted of only whatever information that was communicated to him by the deceased through radio-phone. From my reading of the trial judge's transcript of the notes of evidence, it is my view that TYC do not seem to have been straightforward in his answers to questions posed to him during the trial. He admitted that he seldom go to the campsite of Tung Lee Contractor and that he never went to the said place even after the defendants went to the 1st defendant's concession area and the areas under Licence 27/79 and Licence 7/80 to conduct the inspection in relation to the illegal felling activities. At the outset, he insisted that Borhill Sdn Bhd had no contract with Tung Lee Contractor. This claim clearly contradicted his letter to the 2nd defendant dated 22 January 1987 (reproduced earlier) wherein he informed that since there was flooding at Tung Lee Contractor's pengkalan, there was a possibility that the logs which were seized and not allowed to be removed from the pengkalan by the 2nd defendant will be lost in the flood. In that letter he also wrote as follows:

> Our Sub-contractor, M/S Borhill Sdn, Bhd. also awared (*sic*) of this situation, by sending us a letter, copy of which also enclosed herewith.

His claim with regards to the position of Borhill Sdn Bhd *vis-a-vis* Tung Lee Contractor was clearly stated in his letter to Malayan Banking Berhad dated 11 January 1988 (reproduced earlier) wherein he informed the bank that his sub-contractor, Borhill Sdn Bhd had stolen timber from the 1st defendant's concession area as a result of which Licence 27/79 and Licence 7/80 was suspended by the 2nd defendant. In that letter, he also admitted that "2 units of crawler tractors" and two units of chainsaws "were being caught and detained by the Forestry Department". This admission would corroborate the evidence of DW8, the District Forestry Officer in Sandakan who testified that that seizure of machinery and equipment was carried out in the presence of the deceased.

[67] Another piece of evidence which caught my attention was that, notwithstanding the fact that TYC knew from the deceased that the said 3,008 logs were surrendered to the 2nd defendant, by letter dated 15 July 1987 (reproduced earlier), TYC for Tung Lee Contractor wrote to Borhill Sdn Bhd and demanded that since 2,446 logs were removed from the latter's log pond, he demanded that they produce the logs to him. The evidence showed that these 2,446 logs were part of the said 3,008 logs seized from the deceased. It is my view that this letter seems to suggest that the deceased and TYC trading as Tung Lee Contractor were putting the blame on Borhill Sdn Bhd as being the person responsible for the illegal felling carried out within the 1st defendant's concession area. The reply from solicitors for Borhill Sdn Bhd dated 13 August 1987 (reproduced earlier) is equally interesting, *viz*., that they were instructed that the facts of the case and the whereabouts of the said 2,446 logs "are well known to you". Again in a letter to the 2nd defendant dated 19 March 1988 (reproduced earlier), TYC for Tung Lee Contractor, in requesting for the balance of excess royalty paid to the 2nd defendant earlier, took the opportunity to "take a dig" at Borhill Sdn Bhd by stating that Licence 27/79 and Licence 7/80 were revoked "following our sub-contractor, Borhill Sdn Bhd's involvement in log theft in Yayasan Sabah's forest area and resulting in 3000 logs belonging to us being confiscated by your department". These letters, to me, would denote that the deceased and TYC were deliberately painting an "aura of innocence" on their part with regards to the theft of the said 3,008 logs from the 1st defendant's concession area and that they have no knowledge of the illegal felling and blaming the whole episode on Borhill Sdn Bhd.

[68] I would have thought that based on the evidence discussed above, the deceased and TYC would fail in their claim against the defendants for conversion and negligence. It is clear that Borhill Sdn Bhd was the sub-contractor and the servant of the deceased and TYC trading as Tung Lee Contractor. From my reading of his grounds of judgment, I am of the view that the trial judge did not seem to have considered the inconsistencies found in the evidence of TYC read together with various correspondence referred to earlier and the evidence of DW1, DW2, DW5, DW7 and DW8 but had simply brushed aside their evidence for him to rule that there was no nexus between the illegal logging and the said 3,008 logs. In the light of the totality of the evidence before him, I am of the opinion that the trial judge made an erroneous decision notwithstanding overwhelming evidence which showed otherwise. His decision in allowing the claim of the deceased and TYC went against the root of the whole case. I find it appropriate to mention here the gist of the submission of learned counsel for the defendants at the hearing of this appeal which are, *inter alia*, as follows:

(a) that the trial judge erred in law and in fact in taking into account irrelevant considerations and in failing to give due weight to relevant considerations;

(b) that the trial judge failed to apply a judicial mind to the facts of the case when he equated this case with that of the medieval Robin Hood robbing the rich to give to the poor and held that the scenario in the present case was incomparably worse to the extent that he had to "exorcise" the ghost of Robin Hood thus implying that decision of the 2nd defendant to hand over the said 3,008 logs to the 1st defendant was made capriciously and unjustly;

(c) that the trial judge's conclusion was plainly wrong and could not be supported on any view of the material before him, namely, the conclusion was arrived at without an adequate scrutiny and consideration of all the oral and copious documentary evidence before him, including the deceased and TYC's express admissions of illegal felling contained in their letters to the 2nd defendant dated 19 March 1988 and 12 April 1988 and their letter to Malayan Banking Berhad dated 11 January 1988;

(d) that by having an extremely prejudiced and critical view of the conduct of the defendants, which was unwarranted in the circumstances, the trial judge ended up misdirecting himself on the law and the facts;

(e) that owing to the prejudiced view the trial judge had on the defendants, he came to the erroneous conclusion that any decision in favour of the defendants would amount to an unjust enrichment and an unexpected windfall for the defendants despite having come to an earlier conclusion that the transactions relied upon by the deceased and TYC were illegal and the fact that the logs were extracted from the 1st defendant's concession area; and

(f) that the decision of the trial judge ought to be revisited by this court as it contains a number of internal contradictions, namely, on the one hand, the trial judge held that there was overwhelming evidence to the effect that the deceased and TYC had directly or indirectly engaged in illegal logging outside the areas covered under Licence 27/79 and Licence 7/80 and on the other hand made a finding that there was no nexus whatsoever between the illegal logging and the said 3,008 logs when the evidence showed that there were no other contractors working in the area except the deceased and TYC and their sub-contractors; the latter conclusion is against the weight of the evidence and that there has therefore been a fatal misapprehension of the evidence by the trial judge.

[69] I would agree with the submission of learned counsel for the defendants as summarised above for the following reasons.

[70] It is not disputed that Licence 27/79 was issued to five individuals none of whom was either the deceased and TYC or the deceased and TYC trading as Syarikat Lama or trading as Tung Lee Contractor. The evidence also clearly showed that Licence 7/80 was issued to two individuals none of whom was either the deceased and TYC or the deceased and TYC trading as Syarikat Lama or trading as Tung Lee Contractor.

[71] It is also not disputed that the two licences respectively further state that "this licence is not transferable". Section 24(6) of the Enactment clearly provides that a licence issued under the Enactment shall be personal to the holder and shall not be transferable in any manner whatsoever. Prior to the issuance of the two said licences, the licencees named therein respectively had

granted their respective power of attorney appointing the said Lee Chee Phin and Lai Kon Fah to be "their true and lawful attorneys to do certain acts and things in relation to the approved area". Nothing seem to have happened until 15 January 1983 when the said Lee Chee Phin and Lai Kon Fah "executed" a power of attorney for each of the two said licences appointing the deceased and TYC "jointly and severally to be our true and lawful attorneys to do all or any of the following acts and things in relation to the said land" including, *inter alia*, the following:

(i) to apply to the relevant authorities for issue of licences, permit passes and extraction and removal of timber;

(ii) to make payments of royalties, extraction and other charges payable to the Government in respect of timber extracted and removed;

(iii) to engage contractors or sub-contractors "including our attorneys themselves", ie, the deceased and TYC to extract and remove timber;

(iv) to make arrangements or enter into agreements with buyers "including our attorneys themselves", ie, the deceased and TYC for the sale of all logs produced;

(v) to pay and receive monies and give effectual receipts thereof in respect of extraction fees and other charges and in respect of the sale and shipment of logs;

(vi) to apply and claim from the Forestry Department or other Departments for refund of all excess payment of royalty and/or cess and/or extraction charge paid to the said Departments from time to time;

(vii) to receive and give receipt on any amount refunded by the Forestry Department; all cheques for the refund are to be made and issued in the name of Syarikat Lama (the partners of which were the deceased and TYC); further, to endorse and accept all negotiable instruments "which have been made payable to us", ie, Lee Chee Pin and Lai Kon Fah or to the licencees.

The endorsement at the end of the two said power of attorneys state that Lee Chee Pin and Lai Kon Fah agree to ratify and confirm whatsoever the deceased and TYC "shall lawfully do or cause to be

done by virtue of this Deed" and declare that "this Deed made pursuant to consideration given to us by our attorneys shall be irrevocable". A

[72] Simultaneously and on the same day, ie, 15 January 1983 the said Lee Chee Pin and Lai Kon Fah entered into the 'Timber Extraction Agreement' in relation to each licence with Tung Lee Contractor (the partners of which were the deceased and TYC) wherein they engage the latter to "extract and remove all merchantable timber". The terms and conditions provided therein included the following: B C

(i) that the logs felled shall be transported by Tung Lee Contractor to such log ponds as agreed;

(ii) that Tung Lee Contractor shall be paid RM2.70 for every cubic foot of log delivered to the log ponds; D

(iii) that Tung Lee Contractor may assign or subcontract the logging operations to a third party without obtaining the prior approval of the said Lee Chee Phin and Lai Kon Fah who "will not interfere directly or indirectly with the logging operations". E

[73] Simultaneously on the same day, ie, 15 January 1983 the said Lee Chee Phin and Lai Kon Fah entered into the 'Timber Sale Agreement' in relation to each licence with Syarikat Lama wherein they sold "all the merchantable timber extracted" to the latter for the sum of RM79,375 under Licence 27/79; with regards to Licence 7/80 it is provided that "the nett amount of purchase price payable" shall not exceed RM10,312.50. F

[74] From my reading of the documents relating to the above transactions, I am of the view that the two timber extractions agreements and the timber sale agreements were clearly in breach of s. 24(6) of the Enactment and therefore illegal and any claim based thereon cannot be enforced. I am also of the view that the power of attorneys executed by the licencees appointing the said Lee Chee Phin and Lai Kon Fah as their attorneys and consequently the powers of attorney executed by the said Lee Chee Phin and Lai Kon Fah appointing the deceased and TYC as their attorneys were colourable devices to deceive others into believing that the deceased and TYC were operating as agents or sub-agents for the licensees, a licence being personal to the holder as provided under s. 24(6) of the Enactment. G H I

[75] As discussed earlier, it is not disputed that the deceased and TYC were partners in Syarikat Lama and Tung Lee Contractor. There is no evidence to show that Syarikat Lama and Tung Lee Contractor are companies incorporated under the Companies Act 1965. Syarikat Lama and Tung Lee Contractor seem to be merely business names registered under the relevant legislation applicable in the State of Sabah as the Registration of Business Act 1956 (Act 197), which is an Act to provide for the registration of businesses only applies to Peninsular Malaysia (see s. 1(2)). An enterprise trading under a business name, as opposed to a company incorporated under the Companies Act 1965, is not a legal entity. Upon incorporation, a company exist as an artificial person. Syarikat Lama or Tung Lee Contractor, being merely business names are clearly not legal entities. As such, the legal position would be that the deceased and TYC were at the material time trading as Syarikat Lama or Tung Lee Contractor as the case may be. It is a misnomer to call or refer to them as "companies" as had been done in these proceedings as if they were separate entities *vis-a-vis* the deceased and TYC.

[76] Section 24(6) of the Enactment provides that a licence issued under the Enactment shall be personal to the holder and shall not be transferable in any manner whatsoever. The said powers of attorney and the said agreements referred to above were clearly devices created to camouflage what was essentially transfers of Licence 27/79 and Licence 7/80. A case in point is *Lo Su Tsoon (supra)* the facts of which are as follows:

(a) the Forest Officer, Sabah, issued a licence under the Forest Rules 1954 on 14 September 1965 authorising the Beaufort Timber Extraction Co-operative Society (hereinafter called the licensees) to extract timber at Lumadan in an area measuring about 3,370 acres (hereinafter called the concession);

(b) by a power of attorney dated 3 August 1965 (hereinafter called the first deed) the licensees appointed the Jesselton Development Limited their attorneys in respect of the rights under the licence; there is power to substitute under the deed;

(c) by a deed dated 13 September 1966 (hereinafter referred to as the second deed) the Jesselton Development Limited appointed the respondents, ie, Southern Estate Sdn Bhd ("SESB") in their place as attorneys for the licensees;

(d) SESB exercised their rights under the licence until the year 1968 when they failed to pay royalty and other dues to the Forestry Department; as a result their logs in the log-pond at Weston and the logs in the jungle camp at Beaufort were seized by the Forestry Department;

(e) on 12 December 1968 the appellants, Lo Su Tsoon Timber Depot ("LST") entered into an agreement with SESB wherein LST was given the right to extract timber in the concession area and in return they were responsible for the payment of royalty, taxes, labourers' wages and all expenses for "management and maintenance including medical expenses and insurance"; LST was also required to pay a deposit of $50,000 to cover fines and damages resulting from any violation of the Forest Rules; further, LST could enjoy the use of the buildings, factories, and labourers' quarters and the buildings, factories, and labourers' quarters and the roads in the camp on payment of rental; it was also agreed therein as follows:

(i) that LST agrees that as from the date of taking over, in respect of the area of 2,500 acres from which timber has not been felled under the licence, the licencees shall be paid $175 for each acre and also the Jesselton Development Ltd shall be paid $75 per acre; each year LST shall be responsible to pay on behalf of SESB all such sums payable, namely, to pay $625,000 to the abovenamed persons until full payment;

(ii) that both parties agree that the existing logs measuring approximately 70,000 cubic feet of Serayah and 40,000 cubic feet of Kapor, royalties for which have been fully paid, lying in the log pond at Weston belonging to SESB shall be taken over by LST at the price of $150,000 and also those existing logs lying inside the camp and by the side of the road measuring approximately 80,000 cubic feet shall also be taken over by LST at the price of $70,000; the royalties shall be paid by LST on the day when the bill for payment is received.

[77] Soon after the execution of the agreement, LST gave to SESB four post-dated cheques three of which bounced. SESB sued for the sums due in respect of the three bounced cheques. LST resisted the claim on the ground that they were induced to issue

A the cheques by fraud and in the alternative that there was failure of consideration. The trial judge gave judgment for SESB and held there that there was no fraud and that there was good consideration.

[78] In its grounds of appeal LST alleged error on the part of
B the trial judge in holding that there was no fraud and that there was good consideration. They also raised for the first time a point of illegality. They alleged that the agreement was an assignment of the rights of the licensees under the licence in contravention of an express condition in the licence, and therefore illegal.

C **[79]** In allowing the appeal the Federal Court held that:

(a) the agreement was clearly in breach of the provisions of ss. 23 and 24 of the Enactment and therefore illegal and any claim based thereon cannot be enforced;

D

(b) the power of attorney given to LST was a colourable device to deceive others into believing that LST was operating as agents for the licensees.

E **[80]** In delivering the judgment of the Court, Ismail Khan CJ (Borneo) said:

> It is therefore clear from the agreement and the power of attorney that the respondents had assigned all their rights in the licence to the appellants and in so doing had parted with the whole of their
F interest in the licence. In other words, they had in effect transferred their rights in the licence to the appellants.

[81] In relation to s. 24(6) of the Enactment the learned CJ said:

> The words 'personal to the holder and shall not be transferable in
G any manner whatsoever' are wide enough to include any form of assignment however disguised.
>
> The purposes of this Enactment are to use the words of Lord Hodson in the case of *Chai Sau Yin v. Liew Kwee Sam* ([1962] MLJ 152 at p 153, PC):

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> wider than those which have been called mere revenue enactments and are intended to insure the carrying on of an industry on which the prosperity of the country is to some extent dependent.
>
> The agreement is, therefore, clearly in breach of the provisions of
I sections 23(a), 24(1) and (6) of the Enactment, and is illegal, and any claim based thereon will not be enforced.

The following cases are in point. They concern the assignment of rights under a licence to extract timber in contravention of the relevant rules.

In *Tan Bing Hock v. Abu Samah* ([1967] 2 MLJ 148), the defendant was the holder of a licence to extract timber from a forest area in Chegah Perak in Pahang. The licence was issued under rules 2 and 18 of the Forest Rules, 1935, which provide that no licence issued thereunder shall be transferable by power of attorney, by sub-letting or other means and no sub-contracts or partnerships may be made in connection with the licence in question without prior approval in writing from the District Forest Officer.

The defendant entered into an agreement with the plaintiff whereby the plaintiff was to work and extract timber in the whole of the area; the plaintiff agreed to pay the deposit and all other dues which were required by Government; the plaintiff agreed to construct roads and provide transport and to pay labourers' salaries and their workmen's compensation contributions. The defendant was to make arrangements with Government concerning the area, and the plaintiff agreed to compensate him for all expenses incurred thereby. Another clause in the agreement provided for the payment of $2,000 as a lump sum of total payment in consideration for the logs extracted and sold by the plaintiff. Lastly, the plaintiff was to have the right to arrange for the sale of timber logs extracted from the area.

It was held that the terms of the agreement constituted a complete assignment of the rights in the licence to the plaintiff which was illegal being in contravention of the Forest Rules, 1935. The plaintiff's claim for a declaration that the defendant was liable to perform the covenants in the agreement was dismissed.

In a later case ([1968] 1 MLJ 221) between the same parties in respect of the same agreement the plaintiff claimed damages for breach of the contract to allow him to fell, transport and sell timber from the said area in consideration of the payment of a sum of $2,000. Gill J. dismissed the claim holding that the agreement was an assignment of the plaintiff's rights under the licence in breach of the rules and therefore illegal.

In *Leong Poh Chin v. Chin Thin Sin* ([1959] MLJ 246), the appellant was the holder of a permit to fell timber in the Piah Forest Reserve, Perak. In consideration of a loan by the respondent, he entered into an agreement purporting to assign all his rights and liabilities under the forest permit to the latter's wife. There was evidence that the wife did actually operate in purported exercise of rights assigned to her by the appellant.

A It was held that under sections 20 and 22 of the Forest Enactment, a person cannot lawfully exercise rights in a reserved forest by virtue of permission given to someone else. Respondent's wife's exercise of the rights purported to have been assigned to her by the appellant contravened the provisions of the Enactment and was an illegality.

B **[82]** Later on in his judgment, the learned CJ said:

In the instant case, the consideration moving from the respondents is the assignment of the rights under the licence to the appellants, a consideration for the other promises in the agreement. That includes the promise to buy timber in clause 5. The consideration moving C from the respondents is illegal and so every promise in the agreement becomes illegal. Clause 5 is therefore not severable from the illegal consideration.

[83] Another case in point is *Sundang Timber (supra)* the facts of D which are as follows. The appellant was granted a special licence by the State Government of Sabah on 1 February 1964 to extract timber in an area in Lamag, Sandakan extending over 33 square miles. The licence was deemed to come into force on 1 January 1963 and to expire on 31 December 1972. Certain conditions were E attached to the licence. On 23 January 1963 the parties entered into an agreement prior to the issue of the licence. On 26 March 1964 they entered into what was purported to be an irrevocable agency agreement to replace the earlier agreement for the extraction and sale of timber under the licence. On the same day appellant gave F the respondent a power of attorney irrevocable for a period of 10 years to operate and manage the appellant's business. All the working capital came from the respondent.

[84] By a writ of summons dated 18 November 1972 the G appellant claimed that the respondent was indebted to them and brought an action to recover the amount due on an alleged final statement of account. The respondent in its defence raised the issue of illegality. The learned trial judge ruled that the agreement read with the power of attorney was in breach of the provisions of the H Forest Enactment 1968 and was therefore illegal and any claim based thereon was unenforceable. The appellant appealed. In dismissing the appeal the Federal Court held that the agreement was clearly illegal being in breach of s. 24(6) of the Forest Enactment and that consequently, any claim based thereon cannot I succeed as it would be tainted with illegality. In delivering the judgment of the court, Lee Hun Hoe CJ (Borneo) said:

Just as the financial arrangements for the payment to the licensees is fatal in *Lo Su Tsoon*'s case ([1971] 2 MLJ 161) so also is such financial arrangement between appellants and respondents fatal to appellants' claim as it is a part of the consideration for the assignment to respondents of their rights under the special licence. One of the main reasons for the arrangements under the cover of the two documents is to ensure that respondents have complete control of the business aspects of the two companies and that they would be able to recoup their investments plus substantial profits for both parties. Another reason is to deceive others into believing that respondents were agents when in actual fact all rights have been assigned to them. In other words respondents had stepped into appellants' shoes by acquiring all the rights under the special licence for all purposes.

In the case under appeal the agreement and the power of attorney must be read together as they are interrelated. By these two documents appellants had unreservedly assigned all their rights in the special licence to respondents. The appellants had nothing more to do with the licence but was merely sitting back to collect his dues as agreed for parting with their rights under the licence. They had parted with all their interests in the licence for financial consideration. In effect, they had transferred their rights in the licence to appellants. In my view the agreement is clearly illegal, being in breach of section 24(6) of the Enactment. Consequently, any claim based thereon cannot succeed as it would be tainted with illegality. The power of attorney is necessary if respondents were to deal with others in such timber business, particularly with the Forest Department. As Ismail Khan C.J. remarked in *Lo Su Tsoon*'s case ([1971] 2 MLJ 161) the power of attorney was merely 'a colourable device to deceive others, particularly the Forest Department into believing that appellants (in our case respondents) were operating as agents for the licensees'.

[85] Another case in point is *Cynsan Development Sdn Bhd v. Majunis Tumpi & Ors* [1997] 3 CLJ 396. The facts of the case are as follows. The defendants applied for a forest concession from the Sabah State Government. It was approved on 24 June 1993. Subsequently on 22 April 1996, ie, almost three years later, a licence was issued in favour of the defendants pursuant to the Forest Enactment 1968 authorising the licensee to extract forest produce. The license also required the licensee to make certain payments, fulfill certain conditions and imposed obligations on the licensee to undertake certain community projects for the Forestry Department. Meanwhile, prior to the issuance of the said licence, the plaintiff company and the defendants executed a 'Timber Sales Agreement' on 25 March 1994, ie, about two years before the said

licence was issued, wherein the defendants agreed to sell the timber in the concession area to the plaintiff company. In consideration thereof, some payments were made by the plaintiff company to the defendants. A power of attorney was also given by the defendants to the plaintiff company on the same day. A 'Timber Extraction Agreement' was also executed on the same day between the defendant company and a company named Inwill Resources Sdn Bhd; one Han Ah Wah was a common director of the plaintiff company and Inwill Resources Sdn Bhd.

[86] The plaintiff company then brought the present action against the defendants claiming, *inter alia*, specific performance by the defendants of the timber sales agreement, an injunction to restrain the defendants from committing a breach of the timber sales agreement in selling the timber extracted from the concession area to any other individual or company, damages and costs. The defendants contended that the plaintiff company breached the agreement and that the transaction was illegal. The primary issue before the court was whether the transaction between the plaintiff company and the defendants was illegal in view of s. 24(6) of the Enactment. In dismissing the action, Richard Malanjum J (as he then was) said (at pp. 410-411):

> As it is my finding that both the Timber Sales Agreement and the Power of Attorney were subsisting, the obvious question is: what were their effects and implications as between the plaintiffs and the defendants? Upon reading the contents of both the documents the irresistible conclusion is that upon their execution the defendants had nothing more to do with the said timber licence but to merely sit back to collect the balance of their dues as agreed for parting with their rights there-under. They had parted with all their interests in the said timber licence for financial consideration. (See: *Sundang Timber Co. Sdn. Bhd. (supra)*). And that should make the arrangement illegal being in contravention of s. 24(6) of the said Enactment. Hence, any claim based thereon cannot succeed by reason of illegality. It is obvious that in this case the proviso of what is generally known as the Bowmakers' rule is quite relevant, ie, a claimant's claim is unenforceable when he has either to found his claim on an illegal transaction or to plead its illegality in order to support his claim. (See: *Bowmakers Ltd v. Barnet Instruments Ltd* [1944] 2 All ER 579). This is not a case of where the plaintiffs are not relying on an impugned document tainted with illegality to lay their claim. (See: *Mistry Amar Singh v. Kulubya* [1963] 3 All ER 499; *Tinsley v. Milligan* [1993] 3 All ER 65; *Sajan Singh v. Sardara Ali* [1960] 1 All ER 269 PC). This present case is an action which is founded upon an illegal contract. It is brought to enforce that

> contract. The plaintiffs deny illegality but my finding is otherwise. The proved facts and circumstances led to an irresistible conclusion that there was a clear intended assignment, though executory on certain matters to be performed by the plaintiffs, of the defendants' rights under the said timber licence. And contrary to the submissions of learned Counsel for the plaintiffs I do not find this distinguishable from the decided cases referred to hereinabove. Further, it is also my view that subsequent events arising from the transaction between the parties should not alter its illegal nature simply because such a contract is *void ab initio*. Accordingly I should dismiss this action.

[87] In the light of the authorities referred to above, I would say that the trial judge in the instant case under appeal erred in law and in fact in taking into account irrelevant considerations and in failing to give due weight to relevant considerations. In his grounds of judgment the trial judge found that the "agreements under which the logs were purchased were *ex facie* lawful and the partners were never *in delicto* because they did not know that the agreements formed part of the illegal transactions". I cannot fathom this finding by the learned trial judge. The words "*in delicto*" in the law dictionaries do not seem to stand on its own. In Osborn's *Concise Law Dictionary* (7th ed) it is referred to as "*in pari delicto, potior est conditio possidentis*" and it means "where both parties are equally in fault, the condition of the possessor is the best". In Mozley & Whiteley's *Law Dictionary* the words appear as "*in pari delicto melior est conditio defendentis (or possidentis)*" and it means "Where both parties are equally in the wrong, the position of the defendant (or possessor) is the more favourable, on the principle that where the parties are equally in the wrong, the law leaves the situation as it is and will not act upon the plaintiff's claim".

[88] For support with regards to the above finding that he made, the trial judge went on to refer to the following cases, namely, *Khau Daw Yau v. Kin Nam Realty Development Sdn Bhd* [1982] 1 LNS 81 HC, *Berenger v. Rozario (mw)* [1953] 1 LNS 7 HC, *Sajan Singh v. Sardara Ali* [1960] 26 MLJ 52 and *Daniel William v. Luhat Wan & Another Case (2)* [1990] 1 CLJ 472; [1990] 1 CLJ (Rep) 762. He however did not discuss as to why these cases were cited or the *ratio decidendi* of each of these cases and their relevance to the instant case under appeal before this court. I have perused these authorities and I cannot see the relevance of these cases being cited.

[89] In *Khau Daw Yau*, a decision of the High Court, the facts were as follows:

(i) One Tengku Sepiah sold and transferred a piece of land (Lot 948) that she owned to a company (Futo) for it to develop the land by subdividing it into smaller lots and having buildings erected into smaller lots. Tengku Sepiah was to receive 4 sub-lots with semi-detached houses and which were to be retransferred to her leaving the other 24 lots for disposal by sale. Futo, not being a licenced developer, arrived at an arrangement with the defendant company (Kim Nam) to convert, subdivide and build houses on the said land. Kim Nam was themselves the registered owner of another piece of land (Lot 953) which was also to be developed by conversion from agricultural to building and to be subdivided into several lots.

(ii) The applications for conversion and subdivision of both lots 953 and 948 were made to the relevant Land Office and while these applications were pending, the general public were invited to make bookings for the purchase of the sublots with buildings to be erected thereon. All the sublots were taken up by persons who were non-Bumiputra and sometime thereafter Kin Nam was notified by the Land Office that its applications were approved, ie, Lot 948 is to have 28 sub-lots and Lot 953, 32 sub-lots, but subject to certain conditions, namely, for Lot 953, seven units of terrace-houses and three units of semi-detached houses to be reserved for Bumiputras and for Lot 948, at least 30% of the buildings are to be reserved for Bumiputras.

(iii) The defendant company took the stand that they were obliged to adhere to the special condition that had been imposed when the approval for conversion and sub-division was given which meant that they could not complete the sale to some 30% of those persons who had made bookings for the purchase of lots in that all of those who had made bookings were non-Bumiputra.

(iv) The plaintiff in each of these eight actions which were consolidated who are persons who had made bookings sued for specific performance. The defendant argued that there was no concluded contract on which an action could lie and that even if there was a concluded contract, the special condition as to Bumiputra quota made the performance of the contract impossible and/or unlawful. Further, with regards to suits over Lot 948, the contracts were illegal by virtue of r. 11(1) of the Housing Developers (Control and Licensing) Rules 1970 on the ground that Kin Nam was not the registered owner of the land.

[90] George J ruled that the plaintiffs in all the eight cases were entitled to specific performance and alternatively to an award for damages. As the buildings could not be completed within two years of the imposition of the condition, he ordered that the defendant in each case pays the respective plaintiffs damages to be assessed. At of his judgment, on the issue of illegality, George J said:

> In the instant case the defendants by inviting the purchasers to make bookings, by implication held out themselves as being legally entitled to enter into contracts for the sale of the lots with houses to be built thereon. Applying the ratio in *Archbold*'s case (*Archbolds Ltd v. Spanglett* [1961] 1 QB 374) I find that the contract *ex facie* to be lawful and that in fact it was unlawful was not known to the purchaser. The plaintiffs were never *in delicto* since they did not know the vital fact (that the vendor was in fact not the registered owner of the land) that would make the performance of the contract illegal.

[91] In *Berenger v. Rozarion (mw)*, the plaintiff who cohabited with the defendant until the relationship turned sour sued the latter for the return of a motorcar and certain clothing he alleged were wrongfully detained by the latter. The plaintiff, an employee of the City Council, Singapore had purchased the motorcar with a loan from the City Council. The defendant alleged that he had promised to give her the motorcar as a gift. The plaintiff maintained that he had made it clear that the motorcar could not become the defendant's property until after the loan has been paid off. In allowing the plaintiff's claim for the motorcar, Whitton J said:

> It has been laid down in the fairly recent case of *Bowmakers Limited v. Barnet Instruments Limited* ([1945] 1 KB 65; (1944) 2 All ER 579) that "as a general rule a man's right to possession of his own chattels will be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality in order to support his claim". I am of the opinion the present claim falls within this category.
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> Again it is, of course, well known that the reason the law will not enforce an illegal or an immoral contract is that it is contrary to public policy to do so. I can scarcely think I should be serving the interests of public policy if I were to hold that the defendant, who,

A I consider, is not entitled to the car on any other ground, should have it because she obtained possession of it as a result of an immoral association between her and plaintiff.

[92] In *Sajan Singh*, the facts gleaned from the headnotes of the case report showed the following:

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(i) The plaintiff Sardara Ali, a lorry driver, entered into an agreement with the defendant Sajan Singh, a haulier whereby the defendant was to acquire a lorry, the subject matter of the proceedings, and register it in his own name and obtain a C haulage permit for the lorry, but it was intended that the lorry should be purchased by the plaintiff and used by him on his account.

(ii) The transaction was in contravention of certain regulations D governing the transfer and use of motor vehicles. For some time the plaintiff used the lorry as his own, but operated it in the name of the defendant. Subsequently they fell out and the defendant removed the lorry from the plaintiff's possession without his permission.

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(iii) The plaintiff then brought an action for declaration that he was the owner of the lorry, coupled with a claim in detinue. (According to Mozley & Whitely's *Law Dictionary* (12th ed), detinue is "an old common law form of action for the recovery of goods from a defendant who rightfully acquired possession of F them but wrongfully detained them, ie failed to return them to the plaintiff"). The trial judge was satisfied as to the truth of the plaintiff's claim but took notice of the illegality and gave judgment for the defendant. He held that as both the plaintiff and defendant had practised deceit on the public administration G of the country, it was the duty of the Court to refuse the plaintiff. The Court of Appeal reversed this decision and held that the plaintiff could recover damages for trespass as he did not seek to found his claim on the illegal transaction. The defendant appealed to the Privy Council.

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[93] The Privy Council was of the view that on the facts pleaded, the Court of Appeal was fully justified in reversing the decision of the trial judge. In delivering the opinion of the Board, Lord Denning said:

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It was an action for a declaration coupled with a claim in detinue. In order to get a declaration, it was essential for the plaintiff to show that he was the owner of the lorry and that it was an

authorised vehicle. In order to succeed in detinue, it was essential for the plaintiff to show that he had the right to immediate possession of the lorry at the time of commencing the action, arising out of an absolute or special property in it, see Bullen & Leake, 3rd Edn. p 312. And in detinue their Lordships think he succeeded. Although the transaction between the plaintiff and the defendant was illegal, nevertheless it was fully executed and carried out: and on that account it was effective to pass the property in the lorry to the plaintiff. There are many cases which show that when two persons agree together in a conspiracy to effect a fraudulent or illegal purpose - and one of them transfers property to the other in pursuance of the conspiracy - then, so soon as the contract is executed and the fraudulent or illegal purpose is achieved, the property (be it absolute or special) which has been transferred by the one to the other remains vested in the transferee, notwithstanding its illegal origin, see *Scarfe v. Morgan* ([1838] 4 M & W at p 281), per Parke, B.

In this case, on the facts pleaded and the findings of the trial Judge, the plaintiff had a clear cause of action. He had actual possession of the lorry at the moment when the defendant seized it. Despite the illegality of the contract, the property had passed to him by the sale and delivery of the lorry, compare B*owmakers Ltd v. Barnet Instruments Ltd* ([1945] KB 65 at p 70; [1944] 2 All ER 579), referred to above. When he commenced this action, he had the right to immediate possession. Their Lordships think that in these circumstances he had a claim in detinue. But he had also, as the Court of Appeal has found, a clear claim in trespass. Trespass was not in terms pleaded, but the facts were pleaded. And on the facts the plaintiff was entitled to rely on his possession. The Court of Appeal did not actually direct amendment of the pleadings, but it is clear from their judgment that, had they been asked to do so, they could have done so. Their Lordships think that, on the facts pleaded, they were fully justified in reversing the decision of the trial Judge.

[94] In Daniel s/o D William, the facts of the case as gleaned from the headnotes showed were as follows:

(i) The plaintiff, Daniel s/o D William claimed that he had found a lottery ticket crumpled up at an Esso station. Later be found that the ticket had won the third prize in the Tenth Social and Welfare Services Lottery draw.

(ii) The defendant, however, claimed that he had a right to the property and possession of the social welfare lottery ticket which had won the third prize and given it with other lottery tickets

to his wife for safe keeping. While the defendant was away in Sarawak, their driver asked the wife for the bundle of tickets in order that he may check them. Subsequently the driver returned the bundles but without the winning ticket. The defendant made a report and called his wife and the person from whom he bought the tickets as witnesses.

[95] The trial judge, Lim Beng Choon J accepted the evidence of the defendant and his witnesses and rejected that of the plaintiff. In dismissing the plaintiff's claim the trial judge made the following findings:

(i) that the evidence showed that the defendant bought the lottery ticket and that his driver obtained it by fraud;

(ii) that in the circumstances the plaintiff could not be said to have acquired any right of property in the lottery ticket; neither could it be said that he had a better right to immediate possession of the ticket; that his right, if any, must come from the possessory right vested in the driver who committed the fraud which in law is subservient to that of the defendant, his master;

(iii) the plaintiff had dealt with the lottery ticket in question in a manner inconsistent with the right of the defendant and therefore has committed conversion of the ticket; the lottery ticket is a chattel and action lies for its conversion;

(iv) although the seller of the lottery ticket to the defendant was unauthorized and had therefore committed an offence in selling it without authority, in this case the illegal contract had been fully executed and therefore the title to the lottery ticket passed to the defendant;

(v) there is no doubt at all that the plaintiff had neither the title nor the right of possession to the winning ticket; in such a situation judgment must be given for the defendant since the court does not confiscate the property because of illegality.

[96] The authorities referred to by the trial judge clearly have no bearing upon the instant case under appeal. The issue in the instant case under appeal is whether the said power of attorneys and the agreements relating to extraction of timber and sale of timber would run foul of the Enactment read together with the rules made thereunder. The authorities cited by the trial judge are of no relevance to the issue before the trial court. These authorities surely

cannot constitute as exception to the principles laid down in *Lo Su Tsoon* and *Sundang Timber*. In fact, there are no exceptions so to speak. I would agree with the submission of learned counsel for the defendants that the trial judge erred in law and in fact in failing to give a proper construction and effect to s. 24(6) of the Enactment which clearly does not provide for any exception to the non-transferability of licences granted under the Enactment. May I add that judges should not refer to authorities by just citing the case-name without discussing in their grounds of judgment why such authorities would be relevant to the issue before them.

[97] Consequently, I am of the view that the trial judge erred in law and in fact when he held that the deceased and TYC did not seek or found their claim on the illegal transactions, ie, the powers of attorney and the agreements discussed earlier. Paragraphs 2 to 5 of the deceased and TYC's statement of claim reads:

> 2. That in pursuant of the said agreement(s) and said licences 3008 timber logs were extracted from the said lands of which 2446 logs were extracted from the said lands or which 2446 logs were pursuant to valid Transit Passes issued by the Forest Department towed to a log pond in Sandakan and 562 were waiting to be towed to the log pond in Sandakan from a river bank.
>
> 3. The Plaintiffs and or the said Syarikat Lama are and were at all material times the owner and or entitled to the said 3008 logs.
>
> 4. The First Defendants (*sic*) without any lawful authority and without the consent or permission of the Plaintiffs or of Syarikat Lama sometime in March 1997 or sometime thereafter removed and sold the said 3008 logs.
>
> 5. In the premises the First Defendants (*sic*) converted the said 3008 timber logs to their own use or benefit and wrongfully deprive the Plaintiffs or Syarikat Lama thereof, by reason whereof the Plaintiffs has suffered loss and damage.

[98] The trial judge has found that the 1st defendant was liable for conversion of the said 3,008 logs. Can there be conversion under the circumstances of the instant case under appeal? According to Osborn's *Concise Law Dictionary* (7th ed), conversion is "a tort, committed by a person who deals with chattels not belonging to him in a manner inconsistent with the rights of the owner". In *Winfield & Jolowicz on Tort* (15th ed), the learned author said (at p. 588) conversion may be committed:

> ... by wrongfully taking possession of goods, by wrongfully disposing of them, by wrongfully destroying them or simply by wrongfully refusing to give them up when demanded, for in all these cases can be traced conduct by the defendant which amounts to a denial of the plaintiff's rights or the assertion of inconsistent rights. But if this element was lacking there was no conversion.

Under the heading "Title of plaintiff", the learned author said (at pp. 597-598):

> What kind of right to the goods must the plaintiff have in order that interference with it may amount to conversion? The answer is that he can maintain the action if at the time of the defendant's act he had (1) ownership and possession of the goods, or (2) possession of them; or (3) an immediate right to possess them, but without either ownership or actual possession: This seems to be the law, but it can be elicited only from a great confusion of terminology in the reports. Thus it is said in several cases that the plaintiff must have "a right of property in the thing and a right of possession" and that unless both these rights concur the action will not lie. If "right of property" means "ownership", this might lead one to infer that no one can sue for conversion except an owner in possession at the date of the alleged conversion. But that is not so, for a bailee has only possession and not ownership (which remains in the bailor), and yet the bailee can sue a third party for conversion. And, as we shall see, one who has mere possession at the date of the conversion can generally sue, and so can one who has no more than a right to possess.

[99] I am of the opinion that the claim of the deceased and TYC relating to the tort of conversion cannot stand at all. The deceased and TYC claimed that the said 3,008 logs were extracted from the areas under Licence 27/79 and Licence 7/80. The evidence have shown otherwise which would denote that this is a false claim. It is also their claim that they and or Syarikat Lama are and were at all material times the owners and or entitled to the said 3,008 logs. The evidence of DW1, DW2, DW5, DW7 and DW8 showed that the said 3,008 logs were extracted from the 1st defendant's concession area. The claim by the deceased and TYC that the 1st defendant had without any lawful authority and without their consent and permission had removed the said 3,008 logs also cannot stand. The deceased was present when the 2nd defendant seized the said 3,008 logs. After the seizure, the 2nd defendant handed the same to the 1st defendant as the latter was its true owner. The evidence have confirmed this. That being the position, conversion cannot arise.

[100] I would agree with the submission canvassed by learned counsel for the defendants at this appeal that the trial judge erred in law in holding that to sustain a claim under the tort of conversion, it is not essential for a claimant to establish that it is the true owner of the goods and that mere possession would suffice. The evidence showed that the said 3,008 logs were extracted from the 1st defendant's concession area. With regards to this illegal logging being carried out in the 1st defendant's concession area, the deceased and TYC had put the blame on Borhill Sdn Bhd who was their servant. The deceased and TYC have admitted to the illegal logging being carried out in the 1st defendant's area. Section 20(1) of the Enactment provides that it is an offence to carry out logging within a Forest Reserve unless authorised by or under the provisions of the Enactment. It is clear that the deceased and TYC were not authorised to fell or remove any forest produce from the 1st defendant's concession area. Needless to say, I cannot see the relevance of the deceased and TYC pleading in their statement of claim that the 2nd and 3rd defendants had failed to comply with s. 37(2) and s. 26 of the Enactment (reproduced earlier) which clearly are of no relevance to the circumstances of the instant case under appeal. Any foray into such pleading would, in my opinion, be a futile exercise.

[101] The evidence clearly showed that the deceased and TYC trading as Tung Lee Contractor had no legal right to the immediate possession of the said 3,008 logs. They had no right to sue for conversion of the same. In *Lam Teik Kai v. Hallam Nominees Ltd & Ors* [1970] 1 LNS 55 HC, which was referred to by learned counsel for the defendants, the High Court approved the statement of principle in Halsbury's *Laws of England* Vol. 38, 3rd edition para 775/6 which states: "To constitute conversion there must be a positive wrongful act of dealing with the goods in a manner inconsistent with the owner's rights, and an intention in so doing to deny the owner's rights or to assert a right inconsistent with them". In *Daniel D William v. Luhat Wan & Another Case* [1990] 1 CLJ 472; [1990] 1 CLJ (Rep) 762, which was also referred to by learned counsel for the defendants, the High Court also seemed to require a plaintiff to prove an ownership right before he could succeed in an action for conversion.

[102] In the instant case under appeal, the deceased and TYC trading as Tung Lee Contractor failed to prove that they were the owners of the the said 3,008 logs. Under the circumstances and in the light of the evidence, discussed earlier, I would say that they

were merely in possession of what I would term stolen property. That being the position, I cannot see how their claim for conversion can succeed. The trial judge has erred in law and in fact in holding that all that the deceased and TYC need to show were that Licence 27/79 and Licence 7/80 were valid and that the timber extracted under same was purchased from the licencees. In *Chu Choon Moi v. Ngan Sew Tin* [1985] 1 LNS 134, Syed Agil Marakbah SCJ (delivering the judgment of the Supreme Court) said:

> This is a case where the learned trial Judge has failed to take into account the probative value of the evidence which had been proved and in the circumstances we have to interfere (*Johara Bi v. Lawrence Lam* ([1981] 1 MLJ 139)).

With respect to the trial judge, I would say that the instant case under appeal is also a case where the trial judge failed to do the same which under the circumstances would require appellate interference. In *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545, a judgment of this court, Gopal Sri Ram and Mahadev Shankar JJCA said (at p. 550):

> So, here we have a case where there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him. And of the principles that should govern such a case as the present there is no doubt.
>
> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.
>
> In a case such as this where the task of the court is to determine where the probable truth of the case lies, one can do no better than to recall to mind the words of Viscount Simon (who was in the majority) in *The 'Eurymedon'* [1942] 73 Lloyd LR 217:
>
> > The appellants, therefore, start in this House under the considerable handicap that there are concurrent findings of fact against them. (Which, we hasten to add, is not the case here.) I am far from saying that in these circumstances the House has no jurisdiction to allow the appeal, but it would need very clear and convincing reasoning to justify us in overthrowing what has already been decided. *If it could be*

> *shown that the course of events affirmed by the learned judge could not have occurred, that would be an excellent reason for reversing his view* - in these mundane happenings there is no more conclusive argument than *non est credendum quia* impossibile. *If the impeached decision were shown to be an unwarranted deduction based on faulty judicial reasoning from admitted or established facts, that might lead to its reversal.*
>
> If there were so overwhelming a body of valid testimony for the view that has been rejected that a reasonable man would feel bound to accept it, the appeal would succeed. (Emphasis added.)

[103] In the instant case under appeal, I am of the view that the reasons given by the trial judge were unsatisfactory and in many respects contradictory of each other, for example, in holding that the 2nd and 3rd defendants were grossly negligent and liable to the deceased and TYC for their loss, the trial judge held that the deceased and TYC have adduced evidence of the total value of the logs to be RM2,077,169.68. It must be pointed out here that in their amended statement of claim, the deceased and TYC had expressly pleaded that the value of the logs before payment of royalties is RM1,293,005.36. In supporting the decision of the trial judge on this award, learned counsel for the deceased and TYC, Marina Tiu argued that she had in her submission at the trial pointed out to the trial judge that the total value of the logs is RM2,077,169.68 and not RM1,293,005.36 as pleaded. I cannot see how such an award can be made without an amendment to the pleadings pursuant to the Rules of the High Court 1980 and subject of course to proof. I would say that this award is clearly erroneous and preposterous.

[104] On the whole, I am of the view that this court is entitled to review the findings of the trial judge and to reach its own conclusion upon the evidence (see *Lim Kim Chet & Anor v. Multar Masngud* [1984] 2 CLJ 77; [1984] 1 CLJ (Rep) 23 PC). For the reasons discussed above, this court in a unanimous decision allowed both these appeals by the defendants with costs here and below. All orders of the trial judge were set side. This court also ordered that the deposit for the two appeals be refunded to the respective defendants.

[105] My learned brothers Hasan Lah and Abu Samah Nordin, JJCA have read this judgement in draft and have expressed their agreement to make it the judgment of the court.